TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. [redacted]

H. O. KING, PLAINTIFF IN ERROR,

vs.

THE PUTNAM [redacted] COMPANY.

[redacted]

(25,041)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 758.

H. C. KING, PLAINTIFF IN ERROR,

vs.

THE PUTNAM INVESTMENT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Be it remembered, that on the 15th day of November, A. D. 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, a transcript of the judgment rendered in the District Court of Jackson County in said state in the above entitled cause in the words and figures following, to-wit:

19141.

Filed Nov. 15, 1913, D. A. Valentine, Clerk Supreme Court.

STATE OF KANSAS,
Jackson County, ss:

In the District Court of said County and State.

No. 5450.

THE PUTNAM INVESTMENT COMPANY, Plaintiff,
v.
H. C. KING, Defendant.

Journal Entry.

And now on this May 16, 1913, the same being one of the days of the May 1913 term of said court, the plaintiff appearing by Burch & Litowich, its attorneys, and the defendant appearing in person and by Challis & Brookens, his attorneys, said cause comes on for trial, and the parties plaintiff and defendant announce themselves ready for trial.

And now come twelve good and lawful men of said county, to-wit:

(Here insert names of jurors.)

D. C. Ettle, Philip Fricker, D. A. Olin, J. B. Simecka, W. H. [illegible]uver, George McGinnis, Leonard Arnold, R. S.

Ransopher, T. H. Loughmiller, F. G. Replogle, Preston Taylor, and Herman Banaka.
who are duly empanelled and sworn to try said cause.

Whereupon, plaintiff introduces its testimony and evidence and rests its case.

Whereupon, defendant interposes a demurrer to plaintiff's evidence for the reason that the same is unsufficient to establish a cause of action in plaintiff's favor against the defendant; and after the argument of counsel, the court being duly advised in the premises finds that said demurrer ought to be and the same is hereby overruled, to which ruling of the court the defendant at the time duly excepts.

Whereupon, the defendant introduces his testimony and evidence and rests his case.

Whereupon, the plaintiff introduces its testimony and evidence in rebuttal and rests its case.

Whereupon, the court instructs the jury in writing, and after the argument of counsel, the jury retire to their room to deliberate upon their verdict.

And now upon the same day, the same parties being present as before, the jury return into court their verdict which is in words and figures as follows, to-wit: (Here insert verdict.)

THE STATE OF KANSAS,
County of Jackson, ss:

In the District Court, Thirty Sixth Judicial District.

THE PUTNAM INVESTMENT COMPANY, Plaintiff,
v.
H. C. KING, Defendant.

Verdict.

We, the jury empaneled and sworn in the above entitled case, do upon our oath find for the plaintiff and assess its recovery at $2973.36.

R. S. RANSOPHER, *Foreman.*

which verdict is by the court duly received and filed in the cause.

And now upon the same day, the defendant files his

motion for a new trial of said cause, and by agreement of parties the hearing of said motion is continued until May 21, 1913.

And now upon this May 21, 1913, the same being one of the days of the regular May 1913 term of said court, said motion for a new trial comes on for hearing, and after the argument of counsel, the court being duly advised in the premises, finds that defendant's motion for a new trial ought to be and the same is hereby overruled, to which ruling of the court the defendant at the time duly excepts.

Wherefore, it is considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant H. C. King judgment in the sum of $2973.36, with interest thereon at the rate of 6 per cent per annum from this date until paid; and it is further adjudged by the court that the defendant pay the costs of this action, taxed at $....., for all of which let execution issue.

Approved by
OSCAR RAINES, *Judge.*

Submitted by
BURCH & LITOWICH,
Attorneys for Plaintiff.

Approved by
CHALLIS & BROOKENS,
Attorneys for Defendant.

Endorsements: No. 5450. The Putnam Investment Company vs. H. C. King. Journal Entry. Filed this day May 21, 1913. L. M. Thompson, Clerk District Court. Recorded in Journal "R" Page 51.

Certificate of Copy.

THE STATE OF KANSAS,
County of Jackson, ss:

I, L. M. Thompson, Clerk of the District Court of the 36th Judicial District of the State of Kansas, sitting within and for the county aforesaid do hereby certify the above and foregoing to be a true, full and complete copy, with all the endorsements thereon, of Journal Entry of Judgment in the therein entitled cause as the same remains on file and of record in my office.

Witness my hand and official seal, affixed at my office in Holton, this 14th day of November, A. D. 1913.

L. M. THOMPSON,
Clerk District Court.

(Seal.)

Endorsed: 19141. Putnam Investment Company vs. H. C. King. Certified copy of Journal Entry of Judgment. Filed Nov. 15, 1913. D. A. Valentine, Clerk Supreme Court.

Be it further remembered that on said 15th day of November, 1913, there was also filed in the office of the Clerk of the Supreme Court of the State of Kansas a notice of appeal with acknowledgment of service thereof in the above entitled case in the words and figures following, to-wit:

In the District Court of Jackson County, State of Kansas.

THE PUTNAM INVESTMENT COMPANY, Plaintiff,
vs.
H. C. KING, Defendant.

Notice of Appeal.

To the Putnam Investment Company, Plaintiff, and Burch and Litowich, its attorneys of record.

Whereupon the 16th day of May 1913, the same being one of the days of the regular May, 1913, term of said court, a trial was had therein by jury, in the above entitled cause and a verdict was rendered in favor of the plaintiff, and against the defendant for the sum of $2973.36 and,

Whereas, afterwards and on the 16th day of May, 1913, at the same term of Court, the defendant duly filed his motion for an order setting aside said verdict and granting a new trial.

That afterwards and on the 21st day of May, 1913, at the same term of court, the court made and rendered a decision and order, in the above entitled cause, overruling and denying defendant's said motion for a new trial and setting aside of the said verdict, and rendered a judgment against the defendant and in favor of the plaintiff, upon said verdict, for the said sum of $2973.36 and costs of suit.

Now therefore, you and each of you are hereby notified,

that the above named defendant intends to, and does hereby appeal to the Supreme Court of the State of Kansas, from said decision and order of the above named court overruling and denying defendant's said motion for a new trial, of said cause, and refusing to set aside said verdict and granting to defendant a new trial, and for rendering judgment in favor of the plaintiff and against the defendant, for the said sum of $2973.36, and costs of suit.

Dated this 7th day of November, 1913.

H. C. KING, *Defendant.*
By CHALLIS & BROOKENS,
His Attorney of Record.

Service of the above and foregoing notice of appeal, in the above entitled action, is hereby accepted and acknowledged, this 8th day of November, 1913.

THE PUTNAM INVESTMENT CO.,
Plaintiff.
By BURCH & LITOWICH,
Its Attorneys of Record.

Endorsements: No. 5450. The Putnam Investment Company Plaintiff vs. H. C. King, Defendant. Notice of Appeal. Filed this day Nov. 14, 1913. L. M. Thompson, Clerk District Court.

Certificate of Copy.

STATE OF KANSAS,
Jackson County, ss:

I, L. M. Thompson, Clerk of the District Court of the 36th Judicial District of the state of Kansas, sitting within and for the county aforesaid do hereby certify the above and foregoing to be a true, full and complete copy, with all the endorsements thereon, of Notice of Appeal and acknowledgement of service, in the therein entitled cause as the same remains on file in my office.

Witness my hand and official seal, affixed at my office in Holton, this 14th day of November, A. D. 1913.

L. M. THOMPSON,
Clerk District Court.
(Seal District Court Jackson County, Kansas.)

Endorsed: 19141 Putnam Investment Company v. H. C. King. Certified Copy of Notice of Appeal. Filed Nov. 15, 1913. D. A. Valentine, Clerk Supreme Court.

Be it further remembered that afterwards on the 22nd day of February, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas an abstract of the record in the above entitled cause, in the words and figures following, to-wit:

Filed Feb. 22, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Abstract of Record.

ASSIGNMENT OF ERRORS.

The District Court erred on the trial hereof in the following particulars:

1. The Court erred in failing to adjudge and hold that the contract sued on and testified to by the appellee was against public policy and void for that it purported to obilgate the appellant to sell, convey and transfer a certain tract of land, the title to which was vested in the United States and for which original entry had been made under Sections 2289 and 2290, Revised Statutes of The United States, commonly known as the Homestead Law, but for which no final entry had been made under Section 2291 of said Revised Statutes or final certificate or patent issued, and purported also to bind the appellant to pay the appellee for services in procuring a purchaser to enter into such void and illegal contract with him, the appellant.

2. Also in overruling appellant's objections to certain

incompetent and irrelevant evidence offered by the appellee upon the trial of the case.

3. In overruling appellant's demurrer to the evidence produced by the appellee upon said trial.

4. In sustaining objections to certain competent and relevant evidence offered upon said trial by the appellant.

5. The Court erred in its instructions to the jury.

6. Also in overruling the appellant's motion for a new trial.

7. In rendering judgment against the appellant, instead of rendering judgment in his favor.

8. The Court also erred in adjudging and holding that the appellee was entitled to a recovery either upon the contract sued on or upon the facts proven upon the trial because it was thereby made to appear that the appellee's claim for such recovery was based upon a contract and a transaction contrary to public policy and void in that it was in violation of the provisions, spirit and intent of Sections 2289, 2290 and 2291 of the Revised States of The United States, all of which were well known to the appellee at all times during the pendency of said transaction.

THE PLAINTIFF'S PETITION.

Filed in the District Court of Pottawatomie County, Kansas, March 19, 1906, omitting the caption and formal parts alleges in substance that the plaintiff, The Putnam Investment Company, is a Kansas corporation, that in October, 1904, the defendant H. C. King entered into a verbal agreement with said plaintiff whereby he employed it, as his agent, to sell for him certain real estate in Logan County, Kansas, viz: All of Sec. 35, Twp. 12, Range 36, the E. ½ of N W. ¼, the N. E. ¼ and the E. ½ of S. E. ¼ of Sec. 2 and all of Sections 1, 11 and 15, all in Twp. 13, Range 36 and that the appellant H. C. King represented to J. E. Putnam, Vice President of said Appellee:

"That defendant had not perfected the title to one quarter section of said land, to wit, the East half of the East half of said Section 2 but that it was a part of defendant's ranch and properly belonged to said ranch, and under the terms of any sale which plaintiff should make of said real estate said quarter section should be included therein, and that defendant would convey to any purchaser all of his right, title and interest in and to said quarter section."

Alleges also that said defendant then and there verbally agreed with the plaintiff through its said Vice President to pay said plaintiff for its services in procuring a purchaser for said real estate all of the purchase price thereof above $8000 and to execute to any purchaser procured by it "good and sufficient deeds of conveyance of said real estate other than said East half of East half of said Section 2 and that he would convey to any purchaser of said real estate his interest in said quarter section last mentioned." Alleges that in November, 1905, pursuant to such agreement the plaintiff procured F. D. Shellabarger of Salina, Kansas, as purchaser of said real estate; that said Shellabarger offered to purchase same for $10080 and accept the title thereto upon the terms and conditions above set forth and paid to the plaintiff $1000 as earnest money, agreeing to pay the balance of the purchase price upon receipt of proper deeds of conveyance of appellant's title to said property except said E. ½ of E. ½ of Sec. 2 and a conveyance of his interest in said quarter section the title to which he did not have. Alleges that plaintiff notified defendant of said sale and "made demand upon defendant for his deeds of conveyance to said real estate and his interest in said E. ½ of the E. ½ of said Section 2" to said purchaser but that defendant refused and neglected to complete said sale and to make conveyance of said property to said purchaser who was on said November 25th, 1905, and ever since has been ready and willing to accept conveyance of the title to said real estate except said quarter section to which defendant did not hold title and to accept a conveyance of all interest of appellant in said last mentioned quarter section and was willing and able to pay the purchase price therefor and thereafter on Dec. 20, 1905, he made tender of same. Alleges that appellee thereby earned its commission for its services amounting to $2080 for which sum it prays judgment together with interest and costs.

AMENDED ANSWER.

Filed April 4, 1907. Omitting caption signature and affidavit of verification alleges:

"Now comes the defendant, and makes and files this his amended answer, and for his answer to plaintiff's petition herein filed admits that he was the owner of the land described in the petitian, except the East One-Half of the

East One-Half of Section 2, in Township 13, south of Range 36, West of the 6th P. M. which tract of land was government land, and defendant denies each every all and singular the other allegations and averments contained in said petition."

Verified by appellant, H. C. King.

REPLY.

Filed March 16, 1907. General Denial.

SUBSEQUENT PROCEEDINGS.

After several fruitless trials in the Pottawatomie County District Court the case was duly transferred for further trial to the District Court of Jackson County, Kansas, where it was tried before a jury May 16, 1913, at which trial the following evidence was produced:

PLAINTIFF'S EVIDENCE.

Testimony of H. C. King.

Live in Pottawatomie County, Kansas. First met Mr. Putnam in Oct., 1904, on a stock train on the Union Pacific Railway. I received letter, Exhibit A, through the mail and wrote the answer on the bottom and reverse of it and mailed it back to The Putnam Investment Company.

Exhibit A.

Referred to by the witness was afterwards received in evidence and reads as follows:

"Salina, Kans., Feb. 16, 1905.

H. C. King, Oldsburg, Kans.

Dear Sir:—Some time ago when talking with you on the train, you informed me that you had 2720 acres in Sections 1, 2, 11 and 15, all in 13—36, and all of Sections 35 in 12—36, which you would sell at $3.00 per acre. If we can locate you a buyer, what commission will you pay? Kindly let me hear from you, and oblige,

Respectfully, J. E. Putnam."

The written inscription referred to by the witness reads as follows:

"You can have all you get over $8,000.00 would sell it on ten years' time same as U. P. Land Company but I should want a trifle more and would price it at 3.25. In that case I would give you a reasonable commission. Kindly write me proposition. On ten years you must collect as first payment one-tenth plus your com.

Very truly yours, H. C. King."

I think I received Exhibit B through the mail. I wrote the writing in ink on the back of it, signed it, and mailed or caused it to be mailed to Putnam.

EXHIBIT B.

Referred to by this witness was afterwards received in evidence and reads as follows:

"Salina, Kans., Oct. 2, 1905.

H. C. King, Oldsburg, Kans.

Dear Sir.—We wrote you some days ago regarding land in Logan County, but so far have received no reply. Will you kindly advise us if the figures given us last spring on this property are still good, and what amount you would be willing to carry on the property, and what rate on deferred payment on the land. On receipt of your reply will see what we con do toward disposing of same for you.

Yours truly, The Putnam Investment Co."

The written inscription on the back of said letter referred to by the witness reads as follows:

"Yes, I still have the land. Would like $1.00 pr a cash bal 6 pr et. I might consider other terms. Will likely pass through your place the 9th also abt the 12 or 13th. If you want to see me abt this notify me here before the 9th and Winona to the 12th.

Very truly yours, H. C. King.

Have been away from home is the cause of delay."

I don't remember that I received the telegram marked Exhibit C on November 25, but I remember getting informa-

tion someway. I don't know whether by telegram or letter.

(Said Exhibit C was not received in evidence.)

I think that I sent telegram marked Exhibit D to The Putnam Investment Company in answer to a telegram or letter received from it.

EXHIBIT D.

Referred to by the witness and afterwards received in evidence reads as follows:

Olsburg, Ks., Nov.-27-05.

The Putnam Investment Co., Salina, Ks.

Cant definitely say write fully letter follows. H. C. King."

I received information some way from The Putnam Investment Company concerning the sale of the Logan County ranch. I think I sent Exhibit D in reply to a telegram from the company. I cannot identify Exhibit C or its contents. I wrote the letter Exhibit E and mailed or caused it to be mailed to The Putnam Investment Company.

EXHIBIT E.

Referred to by the witness was afterwards received in evidence and reads as follows:

Olsburg, Kansas, Nov. 27, 1905.

Putnam Investment Co., Salina, Ks.

Gentlemen:—Your telegram received but I do not quite understand it. The 2810 acre ranch I sold sometime ago I still have the 2720 acres south west abt 6 or 7 miles of Winona and abt 3 miles south of Lisbon and U. P. On this tract I am considering a proposition now and party wants until Dec 1st and in the absence of any other definite offer I think I will try him. If he does not take it I should be glad to consider a proposition for its purchase and will not take further offers until I hear from you.

Very truly yours, H. C. King."

I certainly never sent a telegram like Exhibit F as it now reads. I think I sent a telegram substantially like Exhibit F except that the word "option" was in place of the word "absence".

EXHIBIT F.

Referred to by the witness was afterwards received in evidence it being agreed by the parties in open court that the word "absence" therein should read "option" and reads as follows:

"Olsburg, Ks., Nov. 29th.
The Putnam Investment Co., Salina, Ks.
Party has three days *absence.* H. C. King."

I can't say that I received telegram marked Exhibit G from the Putnam Investment Company on or about Nov. 28, 1905. I don't remember receiving it, probably did not receive it. I got information that the ranch was sold and the money paid but I don't remember the date. (Exhibit G above referred to was not received in evidence.) I received the letter Exhibit H through the mail.

EXHIBIT H.

Referred to by the witness was thereafter received in evidence and reads as follows:

"Salina, Kansas, Nov. 28, 1905.
H. C. King, Olsburg, Kans.
Dear Sir:—We received your wire yesterday in answer to ours of the 25th regarding sale of the Logan County Ranch of 2880 acres. From same we inferred that you had written us as to when and where we should meet you to close sale, but as yet no letter has reached us. We have sold this property on the basis of the price given our Mr. J. E. Putnam sometime ago, namely $8000 net to you. We are ready to close sale as soon as the abstract showing clear title is received and approved by purchaser's attorney. We hold $1000 as an evidence of good faith, and have given contract in accordance with above terms. If there are any railroad contracts covering all, or a portion of this property, we think the purchaser would be willing to take assignment of same. Would like very much to have you come to Salina at once in order that this transaction can be closed. Kindly wire us at our expense when you will be here, in order that our Mr. Putnam can arrange to be in town to meet you.
Yours truly, J. E. Putnam, V. Pt."

I think I received Exhibit I through the mail.

EXHIBIT I.

Referred to by the witness was thereafter received in evidence and reads as follows:

"Salina, Kansas, Nov. 29, 1905.

H. C. King, Olsburg, Kans.

Dear Sir:—Your letter of the 27th arrived last night, after we had written you giving terms upon which land was sold. We are also in receipt of your telegram of today. 'Party has three days *absence.*'— which we do not understand. As to the sale will say our telegrams and letter refers to the only ranch upon which you gave us price and terms of sale, and which you specifically described to our Mr. Putnam as follows: E. ½ of E. ½, W. ½ N. E. ¼ and E. ½ ... W. ¼ Sec. 2, all of Sec. 1, all of Section 11, all of Sec. 15, all in town, 13-36, and all of Sec. 35 in town. 12-36, Logan Co. Kans. We have made this sale strictly in accordance with your letters of advice to us, and our purchaser insists upon closing up this sale at the earliest possible date.

Please forward abstracts of this land for examination, and advise us when you will be here to close sale.

Yours truly, The Putnam Investment Co.
By J. E. Putnam, V. Pt."

I remember bringing two letters to the first trial but I don't remember about those especially. I testified at that time that all other letters and telegrams received by me from Mr. Putnam or The Investment Company had been destroyed. Those were the only two concerning the transaction which I had preserved. I don't remember receiving the telegram Exhibit J on or about December 4th, or telegram Exihibit K on or about December 29th, or Exhibit L on or about December 23d. Telegrams were always telephoned to the house and some of the family received them. I don't recollect of having had these telegrams in my hands. The fact of it is— (The telegrams above referred to as Exhibits J, K and L were not received in evidence.) I wrote the letter Exhibit M and had it mailed.

EXHIBIT M.

Referred to by the witness was afterwards received in evidence and reads as follows:

"Olsburg, Kansas, Dec. 6th, 1905.
Putnam Investment Co., Salina, Ks.

Gentlemen:—I have just returned home and your telegrams and letters vere awaiting me. I think it better to write you again instead of wiring you. As I wrote you before you have either sold land I never described to you or you made error when you wrote me as to the numbers and I could not depend definitely on your proposed sale. You wrote or wired some days ago that you had sold ranch of 2810 acres and now you have it 2880 acres. It was on account of this I gave party option to Dec. 1st on my 2720 acre tract, but I do not know anything in the way of my selling it now only I don't want to treat any one badly and I would like to give the party a chance for his money although if I could get $3.00 pr a cash it would be better than I would get if the holder of the option should come to time. If he does not take it and you can get your party to take the 2720 acre place I will let you have it at $8000 —net—I pay no taxes for *this* year—or $5000 for my equity as it is covered with land contracts on which there is due $3260.—on which I am told I get 10 pr ct off if pd before due. In order to get this in the mail I have not figured over the proposition but it is based on $3— pr a cash. There would not be any need of a trip to your place if we should deal, if you pd cash put it in the bank the U. P. Land Co. will deed you the property except 160 a which our company will deed and place in bank. Write me at once if you will take it if holder of option fails to do so.

Very hastily yours, H. C. King."

I wrote and mailed or caused to be mailed Exhibit N.

EXHIBIT N.

Referred to by the witness and afterwards received in evidence reads as follows:

"Olsburg, Kansas, Dec. 27, 1905.
Putnam Investment Co., Salina, Ks.

Gentlemen:—I got your telegram today but was not able

to understand it but I take it that you wished me to meet a Mr. Sallaberger at Manhattan *last Saturday* in the interest of land deal. For obvious reasons I could not do so and as you insist that it is 2880 acres as pr your last letter although I repeatedly said to you I only had 2720 acres I don't see the use of going if I could. Your mistake is not in including E. ½ N. W. & W. ½ N. E. of 2 as I have warantee deed for it. Nor can I see whe[illegible] you are wrong as you do not give me descript or legal numbers of which this 2880 a is composed. Your proposition for sale of 2880 a came at a time when I had an offer for option. I had rather sold to you on terms you name than to sell option but I reasoned if you had sold 2880 acres it could not be construed as a sale of my 2720 a so I sold option which has expired but I am letting time run on to give party a chance to sell it. If you did not speak of the land in 2 I would think you might have got a discription of another property I had a year or so ago but that had no land in sec. 2. I would meet Mr. Sellaberger at Manhattan if any good could come of it but it would be necessary for me to name date. I have been away from home much of the time for three months but will be here most of the time for thirty days and will reply promptly any enquiry.

Very truly yours, H. C. King."

I wrote and mailed or caused to be mailed Exhibit O.

EXHIBIT O.

Referred to by the witness and afterwards received in evidence reads as follows:

"Olsburg, Kansas, Jany. 1, 1906.

J. T. Putnam, Salina, Ks.

Dear Sir:—I got your telegram but could not get the operator to send reply so I will send by mail. If option is not paid out I will wire you date to meet you in Manhattan inside of two weeks or I may stop off at Salina and call on you.

Very truly yours, H. C. King."

I had a son named Arthur C. King who was living on the ranch in Logan County, Kansas, in October, 1904. He

had been living there four years. I never saw Exhibit P prior to the first trial of this case.

CROSS EXAMINATION.

Telegrams that came to me were telephoned to my house. If the family happened to tell me about it, I got it. If not I did not. The telegrams or a copy were not delivered to me.

TESTIMONY OF J. E. PUTNAM.

I have lived at Salina, Kansas, about 26 years. My business is farm loans and real estate, cattle and ranching on the side. I am Vice-President, Treasurer and General Manager of The Putnam Investment Company, (P. 6) and held the same position with the company in 1904 and since its organization. It is a Kansas corporation having its principal office at Salina, Kansas, its principal business is farm loans. We have handled real estate in addition. I first met the defendant, H. C. King, about the middle of Oct., 1904, on a stock freight train on The Union Pacific Railroad about Brookville or Salina. I had never been in Logan County, Kansas, before that time except going through it on the railroad. I had never heard that Mr. King had a ranch in Logan County before that time. I was shipping a carload of calves, part from Terra Cotta and part from Brookville, and I also loaded one or two cars of other cattle.

"After loading I got on the train. At Salina I got luncheon, I sat down to eat luncheon along probably about half past five and I think I either sat down beside Mr. King or he came and sat down beside me and we had some conversation regarding the class of stock on the train and he asked me what I had and I told him. Naturally I asked him the same thing, and from that the conversation led on to ranching until finally he mentioned this ranch in Logan County and gave me the description.

Q. You may state as near as you can what the conversation was between you that day with reference to the land in controversy in Logan County on the train? A. He stated he had this ranch in Logan County, had had it for some years and his boy had been on it and it was not satisfactory either to him or the boy and he decided to quit; that he was shipping some of the stock of the ranch at that time to his farm near Olsburg in Pottawatomie County and that

he was intending to clear up all the stock and wanted to sell the ranch, and I told him that we handled land in connection with our farm loan business; I had quite an extensive acquaintance with the real estate men out there in the western part of Kansas and that possibly we could find him a buyer for his farm, and he stated if we could he would be glad to have us do so. Then I gave him my card of the Company that I represented.

Q. Of the Putnam Investment Company? A. Yes. And he gave me the legal description of the property, giving me the section, township and range and the fractional part of the section I put the memorandum down in my book, and the price at 3.25 an acre and what we called the common railroad contract price 1/10 down and the rest in annual payments, covering ten years.

Q. You say you made a memorandum at that time, did you? A. I did.

Q. Was Mr. King present when you made the memorandum? A. Sitting right beside me in the caboose. (P. 8.)

Q. Did you make the memorandum from the statements made to you as to the description? Ans. I did.

Q. And on his representations? Ans. Yes, sir.

Q. Do you have that memorandum with you? Ans. I have.

Q. Produce it, will you? (Book produced by witness.)

Q. I hand you paper marked exhibit Q and will ask you to state if that is a memorandum you made at that time in the presence of Mr. King as to the description of the land. A. Yes, sir; it is." (P. 9.)

EXHIBIT Q.

Referred to by the witness was thereupon received in evidence and reads as follows:

"H. C. King, Olsburg, Kan.

Homestead E. ½ E. ½	2	13	36
E. ½ N. W. & W. ½ N. E.	2	13	36
All	1	13	36
"	11	13	36
"	15	13	36
"	35	12	36

3 room house 2720 @ 3.25 per a"

"Q. You may state what further was said in this con-

versation concerning this matter? A. Well we went into a general discussion, the description, etc.; he gave me a general description of the land, how it was watered, what buildings there were, what the fencing was, the cultivated land. He stated that he had about six or seven miles of additional fence outside of this land described around property that he had either leased or was using in addition to this land; that section 11 was watered by the North fork of the Smoky running down through it; section 15 was watered on the south side by the Smoky proper, and there was a spring on one quarter in 2, the homestead quarter. He stated that was a homestead that was not proved up on, that it was held under a filing by his son, that this homestead would go—whatever interest he had, that he did not have the title to it, but whoever purchased the property would get what title he had, or rather, what title his son had he would throw that in with the ranch so that the party purchasing could control this tract. He stated the tract was not of much value to the land except as a connecting link between the different sections, that is, sections 1 and 11 and 35, but whoever purchased the property they would give them what interest they might have in that,—put them in a position to control it. Also whoever purchased the property would get this additional fence that was not upon the property proper; that there was, if I remember right, about 15 acres, 10 or 15 acres in alfalfa that was of inferior quality, of no particular value; that there was no other land to speak of in cultivation; that the buildings were what we commonly call ranch shacks, a place for herders or those who took care of the cattle, and there was a small stable for cow ponies or what few horses they wanted to keep up, and that the buildings was of no material value.

Q. And what, if anything, did he say about the price? A. Well, he wanted, that is he would like to have $8000 cash for the place if he could get it; that if we could find a buyer at $8000 cash to him, he would give us all over that we could get. He also priced it at $3.00 per acre for the 2720 acres and throw in what interest they had in the homestead filing—what we commonally called a homestead-filing. At that time I figured up with him what that would be, what it would bring, $8160 and that would then give us $160 commission on a deal of that kind, which would be no commission for deals in that country where commissions ran

all the way from 10% to $1.00 per acre and I so told him. Well, he says, if you find a buyer at $3.00 per acre I will pay you a reasonable commission, or he would sell it on the Railroads contract terms, in which case he want 3.25 per acre. In that case we were to collect 1/10 of the price, which would be 32½c an acre in addition to what commission we were to have, but there was no definite amount arranged for as to commission in case we sold on railroad contract terms. He stated his price at $3.00 per acre and he would like to get $1.00 down, but he would even take $2000 or $1500, or consider any figures on that proposition on the place—any one of which he would like to have us find him a buyer." (Pp. 9, 10.)

I was shipping stock that day to Kansas City. He shipped to Manhattan and took the Union Pacific to Olsburg, where he had his farm. I did not talk with Mr. King or have any communications with him after he left the train that day until the next February. In the meantime I wrote and mentioned to a good many of our local agents scattered around Central Kansas, all of them were representing us in the loan line and I had several of them take men out to see the place at different times with a view of selling. I wrote Exhibit A to Mr. King, mailed it and received it back by mail with the writing upon the bottom and back thereof in ink which Mr. King wrote. I wrote and mailed Exhibit B to Mr. King and received it back through the mail with the writing on the back by Mr. King. I wrote and mailed a communication to Mr. King prior to Exhibit B which never came back to my possession. I now produce a letter-press copy of that letter, marked Exhibit B-1. This was mailed to Mr. King.

EXHIBIT B-1.

Referred to by the witness and thereupon introduced in evidence reads as follows:

"Salina, Kansas, Sept. 25, 1905.

H. C. King, Oldsburg, Kans.

Dear Sir:—We had some correspondence with you about 2720 acres out in Logan Co. some little time ago, and you made us a price of $8000 net to you. Please advise us if it is all right to sell on this basis and you allow us the excess we can procure above that sum. We have an eastern

party now who we believe will buy the place, but he is dealing through two other agents with whom we must divide, consequently would want it understood that you will protect us in the price of $8000 net to you in case of sale. Let us know what amount you would be willing to take down, and the terms on the balance. Kindly let us hear from you by return mail and greatly oblige.

Yours truly,"

Following that I made efforts to sell this land. I talked with our local men, described the property, and asked them to see if they could find a buyer. I had three or four parties out there to see the ranch, but never effected a sale until November.

"Q. Now about what time was that, about what time did you find a purchaser who was interested in the land? A. The 25th of Nov.

Q. And you may state who that was? A. Mr. B. F. Shellabarger of Salina.

Q. You may state what your negotiations with him were? Ans. How it came about?

Q. Yes? . . . Get down to the negotiations with Shellabarger? A. I heard Mr. Shellabarger bought some land and I happened to meet him one day on the street and I says to him, I said to him, you have bought some land in Logan County, some western land. Oh, yes. Where is it, I says, and he says, out in Logan County—the fact is I kind of joshed him about buying short grass land. Well he says—

By defendant: Object to what Shellabarger said as hearsay.

By the court: Overruled.

A. Well, he says, I had some idle money and thought I would take a fly. I says, why did you not ask me, I have some land scattered all over there, I could sell as cheap as any one. Well he says, may be he would buy some more if I had some that would suit him. I asked him where his land was and he said he did not know, it was south of Winona, but he did not know the description. I asked him whether he could not be persuaded to buy some of my land and he said to come up to the office tomorrow and he said he would get out the papers and see where this land is located. The next day I went to his office and he got out his contract and we found that Mr. King's land joined

right up with the 3½ sections that he had bought, in fact, he had about 3¾ sections—one quarter of which was a homsestead, just the same as the King proposition. He says, wait until I call Mr. Liter to the mill and see what he says about it, he says, I don't know anything about the land—Mr. Liter was a partner and he said Mr. Liter and Mr. Palmer were out there and looked at this Farral ranch South of him and he bought it on their say so. He called Liter over from the Mill, phoned for Mr. Palmer to come down and he asked them what they thought about it, if they knew anything about the King land and they said yes. . . .

Q. You may state whether or not Mr. Shellabarger made any request of Mr. Liter as to the character of the King land at that time? A. He did.

Q. Did you get a description of the land Mr. Shellabarger had purchased? A. I did.

Q. At that time? Ans. Yes.

Q. I hand you exhibit R and you may state if that is a correct plat showing the King land involved in this suit, known as sec. 35, 1, 2, 11, 15, and showing the lands which Mr. Shellabarger said he had purchased, the same being 23, 25 and north half 26, 27 and 35? A. It it." (Pp. 12, 13.)

EXHIBIT R.

Referred to by the witness was thereupon received in evidence. Same was a township plat of the ordinary form upon which was marked the location of the land in controversy, and land previously bought by Shellabarger.

"Q. Up to that time had you received any written communication or written documents of any kind from Mr. King except the two letters or rather the writing on the back of exhibit A and B? A. I had not.

Q. Or from any one else purporting to be from him? A. I had not.

Q. You may state now what your conversation with Mr. Shellabarger was with reference to purchasing the King land, what you said to him and what he said to you? A. I said you bought this Farral land at $3.75 per acre and I will sell you the King land for $3.50, the four sections and the quarter, the four sections which was on railroad contract and the homestead entered and proved up and then his interest that King might have in the other quarter, just the

same as he got title to the quarter in the Farral ranch, and we figured it up at $10,080, and I says we will sell you this at $10,080, giving you good title to 4¼ sections and whatever interest Mr. King might have in the other quarter. I told him just as Mr. King told me, that he did not consider the quarter of any particular value only to connect up the ranch, and after conversing with Mr. Liter and Mr. Palmer he says, all right I will take it. I told him this was a better proposition I believed than what he had from a location stand-point, I said, you are out there with a bunch of land and the more land you have the better you are off as a ranch proposition—if you have 8 or 9 or 10 sections a man can do something, but with a small tract, the smaller tracts the less chance of making money out of it. He says, I have got $18,000 here laying idle and I will just take them.

Q. You may state whether he gave you any check at that time? . . . A. He gave me a check for $1000." (P. 14.)

EXHIBIT S.

Referred to by the witness was thereupon offered in evidence without further identification or evidence concerning it. The defendant objected to its introduction as incompetent, irrelevant and immaterial, which objection was overruled. Said exhibit reads as follows:

Salina, Kansas, 11/25, 1905.

"Shellabarger Mill & Elevator Co.
Pay to the Order of The Putnam Investment Co. $1,000.00
One Thousand & No/.....Dollars.
Shellabarger Mill & Elevator Co.
F. D. Shellabarger,
Secretary.
To Planters State Bank, Salina, Kansas."

I am somewhat familiar with Mr. Shellabargers business and the conduct of it. He was engaged in the milling business with The Shellabarger Mill & Elevator Company. He was an officer of the company. He was worth from $60,000 to $75,000, probably $80,000 or more.

"Q. You may state what further negotiations you had with Mr. Shellabarger with reference to this matter? A.

I drew up an ordinary memorandum of sale, it was signed up at that time, I told him that I would see to getting the abstract and good title, and talked generally about closing the deal, etc.

Q. I hand you Exhibit P and you may state if that is the memorandum that you drew up and if Mr. Shellabarger signed it and if that is your signature at the bottom of it? A. It is.

Q. Up to the time that you had signed this exhibit P had you received any communication from Mr. King, or your company, except the writing in ink upon the back of the two letters marked exhibit A and B? A. I had not.

Q. Or from any body purporting to represent him in any way? A. I had not." (P. 15.)

EXHIBIT P.

Referred to by the witness was thereupon introduced in evidence and reads as follows:

"ARTICLES OF AGREEMENT, made this 25th day of November, A. D. 1905, between H. C. King, of Olsburg, Kansas, party of the first part, and F. D. Shellabarger of Salina, Kansas, party of the second part, Witnesseth: That the said party of the first part hereby convenants and agrees that if the party of the second part shall make the payment and perform the covenants hereinafter mentioned in this instrument, the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrance whatever, by a good and sufficient warranty deed, together with complete abstract of title, showing perfect title, to be approved by purchaser's attorney, the following lot, piece or parcel of ground, viz:

All of Section thirty-five (35) in township twelve (12) south of range thirty-six (36); also the east half of the north-west quarter, north-east quarter, and the east half of the south-east quarter, all in section two (2); all of section one (1); all of section eleven (11); and all of section fifteen (15); all in township thirteen (13), south or range thirty-six W. 6th P. M., Logan County, Kansas, and containing in the aggregate twenty-eight hundred and eighty acres.

And the party of the second part hereby covenants and agrees to pay to said party of the first part the sum of Ten Thousand and Eighty Dollars, in the manner following: One Thousand Dollars cash in hand paid, the receipt of

which is hereby acknowledged, and the sum of Nine Thousand and Eighty dollars ($9,080.00) upon the receipt of proper deeds of conveyance together with complete abstracts. Second party to have reasonable time for examination of abstracts after received, with interest at the rate of....per cent per annum, payable.....annually on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land subsequent to the year 1905. And in case of the failure of said party of the second part to make either of the payments or perform any of the covenants on his parts hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by said party of the first in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to reenter and take possession of the premises aforesaid.

It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, the parties to these presents have hereunto set their hands the day and year first above written.

H. C. King,
By The Putnam Investment Co., Agents.
By J. E. Putnam, Vice-Prest.
F. D. Shellabarger.

Witnessed by
M. B. Palmer,
W. O. Lyter.

State of Kansas, Saline County, ss.

Be It Remembered, that on this 27th day of November, A. D., 1905, before me a Notary Public in and for said county and state, came F. D. Shellabarger, and J. E. Putnam, Vice President of the Putnam Investment Company, to me personally known to be the same persons who executed the foregoing instrument and duly acknowledged the execution of the same.

In Testimony Whereof, I hereunto subscribe my name and affix my official seal on the day and year last above written.

My commission expires August 1, 1907.
(Seal) J. D. Wellington, Notary Public, Salina, Kansas.
Endorsed: Articles of Agreement from H. C. King to F. D. Shellabarger. State of Kansas, Logan County, ss. This instrument was filed for record on the 5th day of Dec. A. D., 1905, at 1 o'clock, p. m., and duly recorded in book 3 of Miscl'in's at page 478.
(Seal) R. F. Abell, Register of Deeds."

I mailed Exhibit H to H. C. King on or about the day of its date. I received Exhibit E Nov. 28, in the night. Exhibit F was delivered to me by the agent of The Western Union Telegraph Company on or about the day of its date. I wrote and mailed Exhibit I to Mr. King. (P. 16.) I received Exhibit M through the mail. On Dec. 8 I wrote another letter and caused it to be mailed to Mr. King.

"Q. I hand you Exhibit T and you may state whether or not in the ordinary course of business at your office a copy of the letter which you wrote and mailed to Mr. King as of December 9, 1905, was taken in the impression book which you now have? A. It was.

Q. It that a copy? A. Yes, sir.

Q. You may state if the original was addressed to H. C. King at Olsburg, Kansas, and deposited in the U. S. Mail, postage prepaid? A. It was.

Plaintiff offers in evidence Exhibit T.

By Defendant: Object as not best evidence.

By the Court: Overrulled." (P. 17.)

EXHIBIT T.

Referred to above was thereupon read to the jury, viz:

"Salina, Kansas, Dec. 9, 1905.

H. C. King, Olsburg, Kans.

Dear Sir:—Yours of the 6th regarding the Logan County ranch is received, and regarding the discrepancy in the number of acres referred to in your letter, we believe that if you will look at our telegram you will find that same stated 2880 acres, and not 2810. We arrived at these figures through the description given our Mr. Putnam. It seems that the difference in the acreage arises through including the W. ½ N. E. ¼ and E. ½ N. W. ¼ section 2 which we understand, is included as a part of the ranch.

Now, as to sale of this property, as previously advised

you, we have sold this absolutely, and in accordance with the price you have made us,—namely $8000 net to you, and have given contract covering same. There are no reservations as to taxes, and the purchaser certainly does not to pay same for 1905. We wish it understood most emphatically, that our sale was not made on condition that some other party should not take it, but that it is a sale outright and unqualified. As before stated we hold $1000 on account of this sale, and our man stands ready to complete the deal at this time. From your letter we take it there is nothing in the way of closing this sale, with the exception that you now ask that the 1905 taxes be paid by the purchaser, and that you prefer to give some other party the preference, neither of which we recognize. Our client will expect this sale closed in accordance with the agreement, and as it is a good sale, why can't you run up here and get the sale closed? I am satisfied that with a few moments' conversation everything can be settled satisfactorily to both parties.

What is the condition of the title to the W. ½ N. E. ¼ and E. ½ N. W. ¼ section 2, and what title or interest have you in same, and what sort of conveyance of that interest could be made? If it has not been proved up on, could not relinquishment, or assignment of the present interest be arranged, so as to eventually give Mr. Shellabarger good title?

Trusting we can get this matter promptly closed, we are,

Yours truly,

(SIGNED) J. E. Putnam, V. Pt."

I received Exhibit N through the mail on or about its date. On or about Dec. 29, 1905, I delivered to the agent of The Western Union Telegraph Company at Salina, Kansas, for transmission to H. C. King at Olsburg, Kansas, a telegram of which Exhibit U purports to be a copy.

EXHIBIT U.

Referred to by the witness was thereupon received in evidence and reads as follows:

"Salina, Kans., 12, 29, 1905.

H. C. King, Olsburg, Kans.

When can you meet me in Manhattan answer. J. E. Putnam, V. Pt." (P. 17.)

After receiving Mr. King's letter dated Jan. 1, 1906, Exhibit O, I had no further communication with him by wire, letter or conversation prior to the commencement of this suit. After receiving the letter of the 27th, marked Exhibit E, I had a further conversation with Mr. Shellabarger on Dec. 3, at which Mr. Liter, Mr. Palmer, Mr. Shellabarger, C. W. Burch and myself were present. This was at our office in Salina. The validity of the memorandum marked Exhibit P was discussed and it was stated that it was of no legal force.

"Q. Who made that statement? A. Well I believe you did, and I also told Mr. Shellabarger that it was of no force as far as he and Mr. King was concerned; that Mr. King never mentioned the abstract to me in our conversation on the train. I never asked about it because it is customary if a man buys a piece of property he gets evidence of title through the abstract. I told Mr. Shellabarger we could not force Mr. King to furnish an abstract but if Mr. King did not have an abstract and would not furnish it, that I would furnish it at my own expense; that four sections of the land, what they called railroad contract land, one abstract would cover the entire four sections; that Mr. King no doubt had an abstract to the one quarter in section 2 that was proved up on and the other quarter why there was always a question whether he had any title at all to that more than the filing of his sons as a homestead, and I thought the process would be followed in conveying his title to this quarter that was followed in conveying to Mr. Shellabarger of the quarter in the other ranch, so he would eventually control it.

Q. In the matter of this agreement, marked Exhibit P, reciting that he convey 2880 acres described was that discussed at that time? A. It was.

Q. And what was said about the condition of the title to the one quarter? A. The condition of the title always was in question; we did not know whether Mr. King's son had perfected the title or not, but whatever title he or his son had in it would go with the ranch, if they had any. If not, Mr. Shellabarger was to take it without it, he could have the 2720 acres straight with an assignment or an arrangement of whatever there might have been in the other quarter if they still had an interest. If not, he got nothing.

Q. And about the price, what did Mr. Shellabarger say as to whether he was willing to take it under those condi-

tions. A. The price was always the same $10,080.00, and he said that was all right that he would take the 2720 or the 2880 and pay the same figures for it, because the conversation that night was on the same basis as the conversation of Nov. 25, when the matter was first mentioned." (Pp. 18, 19.)

I retained Mr. Shellabarger's check and talked with him a number of times after the night of Dec. 3, 1905.

"Q. And you may state whether or he has on different occasions said that he was willing, able and ready to go ahead and complete the deal?

By Defendant: Object as incompetent, irrelevant and immaterial.

By the Court: Overruled.

A. He always has, several times he has said he was ready, able and willing to pay, and is yet." (P. 19.)

I sent Exhibit P up and had it recorded in Logan County.

EXHIBIT V.

Was thereupon offered in evidence by the plaintiff. Same was a certified copy of the record of the U. S. Land Office at Colby, Kansas, so far as the same relates to the East Half of the North-east Quarter and the East Half of the South-east Quarter of Section 2, Township 13 South, Range 36 West of the Sixth Principal Meridian in Logan County, Kansas, showing the following facts:

That said tract of land was originally entered under the U. S. Homestead laws (Sections 2289 and 2290 Revised Statutes of The United States) by Charles T. Clarke, Feb. 4, 1890, whose entry was cancelled Nov. 4, 1898; that said land was thereafter entered as a homestead under the above act by Arthur C. King on the 3rd day of June, 1901, that King's said entry was never perfected by final proof or final entry, but was cancelled by relinquishment Oct. 27, 1904, and the land thereafter entered as a homestead under said law July 11, 1905, by Don Stalsworth, whose entry remained uncancelled but not perfected at the date of the certificate of the register to the correctness of said record, viz: Sept. 2, 1907.

I had never before this suit was brought received any information from anyone other than Mr. King, or from the records of Logan County as to any land he owned in that County. The only information I had concerning the de-

scription of his ranch was what he gave me on the train. In writing letters to him I took the description from the book, Exhibit Q, which has been offered in evidence. That was the only description I ever had. We have produced in evidence today, either the original or a copy of all letters and telegrams either sent by me or my company to Mr. King or received by either of us from him. From October, 1904, until the suit was brought I had no verbal conversation with Mr. King. I never sent him a copy of Exhibit P and never showed it to him until the first trial of this case. I never communicated to him in any manner its terms except as mentioned in the letters which have been introduced in evidence. (Pp. 20, 21.)

CROSS EXAMINATION.

I am the chief stock holder of The Putnam Investment Company. Mr. Burch is one of its directors and holds one share of its stock. The main business of the Company is to make farm loans, but we sell some property in connection with our loan business. I never saw Mr. King before the evening when I met him on the train at either Brookville or Salina. My recollection is that my first conversation with him was after we left Salina. While I was eating my lunch on the train he mentioned his land and asked me if I had a ranch, and that led up to the statement from him that he had this ranch in Logan County. He made the statement that he had the ranch, that it was not running satisfactorily, and he wanted to sell it. I asked him the numbers of the ranch, what he wanted for it, and probably told him I might be able to find him a buyer. I did not tell him I was a real estate agent. I told him what my business was, and gave him a card of the firm. After that he said he would be glad to have my assistance and he gave me this description. He gave me these numbers and I put them down in my book. He told me what land he owned and I put it down. I asked him what he wanted for it and he told me. (Pp. 21, 24.)

"Q. What did he tell you? A. He said he wanted $8000 out of it; if we could get $8000 to him we could have all over that we could get or he would sell it for $3.00 an acre, that is, figuring on 2720 acres and throw in the interest of this one quarter and he told me about the homestead filing that his son had. He says now this could

be commuted in 14 months by paying cash to the Government, he suggested that to a future purchaser if they wanted to clean up the title—at the end of 14 months it would be commuted and pay $2.50 an acre and get possession and title from the Government." (P. 25.)

He said he would sell the ranch on railroad land contract terms to any good man. In that case he would pay a commission. (P. 26.) I took out my memorandum book at that time and took down the proposition. (P. 27.)

"Q. You put down in your memorandum a description of the homestead quarter, did you? Ans. Yes, sir; and marked the word homestead.

Q. When you sold to Mr. Shellabarger you say you did not know which was the homestead quarter, is that correct? A. I marked in my memorandum homestead but I did not know whetherthe word homestead at that time referred to the quarter that the patent was issued for or referred to the quarter the filing was on, so I put both descriptions in the agreement with Mr. Shellabarger, just the same as Mr. King gave it to me on the train, as there was one quarter there might be a question about the title." (P. 28.)

He may have said to me that if I found a buyer to submit my proposition. I believe he did say in connection with the proposition of selling at $3.00 per acre and $1.00 down that he would take $2000 or even $1000 down and on that basis if I got a proposition to send it in but on the $8000 proposition he would be glad to take the $8000 and give us all we could get over. I did not ask him to list the land with me. Nothing was said about listing it. I have no recollection of his telling me that he never listed his land with any agent. He did not tell me that the only way he ever dealt with agents was that if they got a proposition to send it in to him and if satisfactory to him he would make the deal. (P. 29.)

"Q. What was said about title, the character of the deed he was to make? A. He stated if I recollect right that the railroad land was held under contract partially paid out and that he got title to one homestead quarter in section 2; that the other quarter was considered a homestead filing in the name of his son which if not perfected by the time a buyer was found whatever interest he had would be transferred so that the purchaser would eventually get control, get title. I don't think anything was mentioned

about abstracts; I don't think that matter was discussed.

Q. Was anything said about taxes? A. Not a word.

Q. Was anything said about abstracts? A. Nothing was said about taxes and I think nothing was said about abstracts.

Q. What was said about warranty deed? A. Well I don't know as anything was said about warranty deed, any more than he had good title to one quarter in 2 and the rest rested on Railroad land contract.

Q. How did he propose to convey the land? A. If we could sell it for such or such money that he would turn it over to the man. I don't think warranty deed was mentioned.

Q. Was a quit claim deed mentioned? A. No, sir; no deeds mentioned.

Q. No abstract of title and no deeds mentioned, warranty deeds? A. I don't think we went into that; it would have been customary,—

Q. Was there anything said in the way of furnishing abstracts of title for examination? Ans. I don't think so.

Q. Anything of that kind? Ans. I don't think so." (P. 30.)

As I remember the first time I wrote to him was in February, 1905. I next wrote to him in September, 1905. I wrote him on October 2nd, 1905. (P. 32.) After this correspondence had begun I sold the land to Mr. Shellabarger. I had known him 16 or 17 years. We live in the same town and are on good terms. After the contract was executed I gave one copy to Mr. Shellabarger and kept this one here. It was executed on November 25th. I kept it till about December 4th and then sent it to the Register of Deeds of Logan County for record. I sent it out there to give public notice that a deal was pending. I judged from Mr. King's letters and telegrams he was trying to play horse. At the time of the meeting of Mr. Burch, Mr. Palmer, Mr. Liter, myself and Mr. Shellabarger we had Mr. King's letter and the two telegrams together with this contract and in that conversation the authority of The Putnam Investment Company to bind Mr. King to the written contracts came up. Mr. Burch then said that so far as binding Mr. King and Mr. Shellabarger it was of no force because The Putnam Investment Company had no authority to sign Mr. King's name.

"Q. Then what did you do with Mr. Shellabarger when

he found out he had no binding contract with Mr. King, did you attempt to repair the damage? A. There was no call for it; it was simply a memorandum between Mr. Shellabarger and myself.

Q. After Mr. Burch advised you this contract had no legal standing was there not some change made in the contract? A. Not a particle from the original contract, the original terms had with Mr. Shellabarger. He agreed to buy on the terms and conditions in our original conversation, wherein he was to get 2720 acres and whatever interest Mr. King had in the 160 acres in addition. . . .

Q. Do you remember of testifying in the former trial of this case that after you had discovered that the contract was of no value that you materially changed matters? A. No, sir; I never testified like that.

Q. Had a different deal with Mr. Shellabarger? Ans. No, sir.

Q. In which he agreed to accept this land with the homestead quarter, etc.? A. I testified there was a subsequent conversation after the execution of that contract.

Q. Between you and Mr. Shellabarger? A. Yes, sir.

Q. What was that subsequent conversation? A. To the effect that he would take the land, the 2720 acres and whatever interest Mr. King might have in the 160 acres in addition, and if he had none he would take the 2720 acres at the $10080.00 price. This difference was that if Mr. King would not furnish an abstract I agreed that I would furnish it out of our profit." (Pp. 36, 37.)

In order to complete the sale with Mr. Shellabarger I told him if King would not furnish an abstract of title that I would do so. I remember testifying in former trials of thic case. I did not testify that I had notified King of this agreement. I did testify I notified Mr. King of this agreement under these conditions.

RE-DIRECT EXAMINATION.

"Q. Now with reference to the matter of abstracts, state whether or not it was in the fall of 1905 the custom in central and western Kansas for a seller of real estate to furnish abstracts of title?

By Defendant: Object as immaterial.

By the Court: Overruled.

A. It has always been the custom to furnish abstracts of title whether asked for or not." (P.38.)

Thereupon the plaintiff rested his case and the defendant interposed a

DEMURRER TO THE PLAINTIFF'S EVIDENCE,

which omitting the caption and signatures reads as follows:

"Now comes the defendant and demurs to the evidence of plaintiff herein for the reason that the same does establish a cause of action against the defendant and in favor of the plaintiff."

Said demurrer was overruled by the Court.

DEFENDANT'S EVIDENCE.

Testimony of H. C. King.

I first met Mr. Putnam on a freight train in 1904. In our conversation he asked me if I had some Western land. I told him I had. He asked me if I wanted to sell it and I told him I did. He said he might help me sell it. He took out a memorandum book and asked me to help him out with the description. I told him I would not give anybody the exclusive right to sell the land. If he got a proposition to submit it to me and I would try and deal with him.

"Q. Did he give you a card indicating his business? A. I think he did give me a card and I took him to be a loan agent." (P. 40.)

I told him I wanted $8000 for the land.

"Q. Was there anything said in that conversation about your furnishing warranty deeds to the property? A. No, sir.

Q. Or abstracts of title? A. No, sir.

Q. Was there anything said in that conversation about furnishing abstracts of title to be approved by the lawyer of the purchaser?

By Plaintiff: Object as calling for conclusion of the witness, incompetent, irrelevant, immaterial.

By the Court: Sustained." (P. 41.)

Cross Examination.

"Q. And you say you told Mr. Putnam about the Govern-

ment quarter there, about the quarter your son had a filing on, did you not? A. I think I told him if a man bought the land he could have the homestead if he wanted it.

Q. Did you not tell him that the east half of the east half, that your son had a filing on it? A. Well, I don't remember telling him that. Of course, he had a filing on it." (P. 43.)

"Q. You recall that he showed you one of the cards of The Putnam Investment Company, don't you; that he handed you one of the cards? A. Well, sir; I think I remember that.

Q. And he told you that company was engaged in the loan business and also handled some real estate? A. I did not understand that; I thought he was a loan agent. I did not understand he was a real estate agent by what he told me." (Pp. 45, 46.)

RE-DIRECT EXAMINATION.

"Q. I want to ask you this question—why was it, Mr. King, that you did not complete this sale through Mr. Putnam when he told you he had found a buyer? A. Because they wanted 160 acres more land than I had! they wanted title to 160 acres more land than I had.

Q. Was there any other reason why you did not complete that sale? A. There was an option stood in the way part of the time; I had sold an option on the land. Of course when the option run out if he had taken the number of acres I had I would have let them have it." (P. 49.)

I never gave Mr. Putnam authority to execute this contract Exhibit P or any similar contract for me. (P. 51.)

THE STENOGRAPHER'S TRANSCRIPT OF THE TESTIMONY OF J. E. PUTNAM.

Given at a former trial of the case was received in evidence, viz:

"Q. Did you notify Mr. King that you had entered into this agreement for him? A. Yes, sir.

Q. The written agreement? A. Yes, sir." (P. 52.)

Thereupon both parties rest.

INSTRUCTIONS TO THE JURY.

The Court instructed the Jury as follows:

"Gentlemen of the Jury: It is the claim of the plaintiff in this action that it is a corporation. That in the month of October, 1904, the defendant King entered into a verbal contract with the plaintiff wherein and whereby he employed the plaintiff as his agent to sell for him the real estate described in the petition, and agreed that if the plaintiff would find a purchaser for such real estate, the defendant would pay to the plaintiff as a commission for its services in finding such purchaser, all the purchase price of such real estate above the sum of Eight Thousand Dollars. Plaintiff claims that about the 25th of the month of November, 1905, it procured a purchaser, willing, ready and able to purchase such real estate for the sum of Ten Thousand and Eighty Dollars, and notified the defendant that it had found such purchaser, and of his willingness, readiness and ability to make such purchase, and demanded of the defendant that he carry out his part of the contract. That defendant refused and neglected to comply with his part of the contract, and refused and neglected to pay the plaintiff its commission for such sale, which it claims amounts to the sum of Two Thousand and Eighty Dollars, with interest thereon at the rate of 6 per cent. per annum from the 19th day of March, 1906.

The defendant under the pleadings in the case admits that the plaintiff is a corporation, admits that he was the owner of the land described in the petition as alleged therein, except the East half of the East half of Section 2, Township 13, of Range 36, but generally denies all the other allegations of the plaintiff's petition; and upon the issues thus joined, the evidence in the case and the instructions now given you by the court, you are to determine the rights of the parties to this action."

Instruction No. 1, relates to the burden of proof which the jury is told is upon the plaintiff.

2. Instructs the jury that they are the exclusive judges of the weight of the evidence, of its credit and value.

3. Instructs the jury as to their duty if any witness appears to have willfully testified falsely.

4. Instructs that in weighing testimony the demeanor of the witness and reasonableness of his statements may be considered.

5. Instructs that jury can take into consideration in weighing testimony knowledge common to mankind.

6. Instructs that it is a requisite to a valid contract that the minds of both contracting parties meet on each material ingredient thereof.

6½. Instructs that if the defendant did not understand he had authorized plaintiff to find a purchaser for his land upon the terms stated in the petition, plaintiff could not recover for want of mutuality in the agreement.

7. "If you find from the evidence in this case that the plaintiff and the defendant entered into the contract sued on in this action, and that no time was fixed in such contract when the plaintiff should perform the parts of such contract obligatory upon it, then the law will imply that they were to be done within a reasonable time after such contract was entered into; and if you further find from the evidence that the plaintiff, relying on such agreement, did, within a reasonable time, find a purchaser, ready, willing and able to purchase at the price and under the terms of such agreement made between the plaintiff and the defendant, then the plaintiff is entitled to recover its commission under the terms of the agreement.

8. Where one employs a real estate agent to sell, or to procure a purchaser for property which he represents as his own, or in which he claims to have an interest, and, upon the agent's producing a purchaser ready, willing and able to purchase such property or such interest therein, at the price and on the terms agreed upon by such owner and his agent, refuses to complete the sale, he is liable to the agent in an action for the commission stipulated in the contract of agency, whether the property belonged to the principal or to another.

9. You are further instructed that the procuring of a purchaser ready, able and willing to purchase upon other or different terms than those agreed upon between the plaintiff and defendant would not entitle the plaintiff to a commission from the defendant for such proposed sale.

10. You are further instructed that if a real estate agent fully performs his contract with a land owner in procuring a suitable purchaser for the land, he cannot be prevented from recovering his commission because the owner subsequently changes his mind about making a sale of his property.

11. I further instruct you, that, if the plaintiff recovers at all in this action, it must do so upon the contract set forth in its petition, and cannot in this action recover upon

any agreement or contract made after the date of the contract alleged in its petition.

12. Certain letters between the parties to this action have been permitted to be introduced and read to you in evidence in the case, not for the purpose of establishing a contract upon which the plaintiff might recover other and different than the oral contract sued on in the action, but for the purpose of aiding the jury in determining whether or not the plaintiff and defendant entered into the contract sued on, and whether or not the terms and conditions of the same have been carried out on the part of the plaintiff, and violated by the defendant; for the plaintiff to recover at all it must do so under the terms of the contract alleged in the petition.

13. If you find from the evidence in the case that in the month of October, 1904, on the Union Pacific Railroad, the plaintiff and the defendant entered into a verbal contract, wherein the defendant agreed with and authorized the plaintiff to sell the real estate described in the petition of the plaintiff for the sum of Eight Thousand Dollars, and agreed that the plaintiff should have, as commission for such sale, any sum in excess of Eight Thousand Dollars that plaintiff should sell said premises for; and you further find that the plaintiff procured a purchaser for said premises, who was ready, willing and able to buy the same and pay therefor the sum of $10,080.00, and that the defendant refused to sell the same to such proposed purchaser, or to pay the plaintiff its commission for such sale, then you should find for the plaintiff and assess its damages at the sum of $2,080.00, with interest at 6 per cent. per annum from the 19th day of March, 1906. If you do not so find, your verdict should be for the defendant."

THE VERDICT OF THE JURY.

Returned May 16, 1913, was in favor of the plaintiff and assessed the amount of its recovery at $2973.36.

MOTION FOR A NEW TRIAL.

Filed by the defendant H. C. King, May 16, 1913, upon the grounds: (1) Abuse of discretion, (2) Misconduct of the jury, (3) Misconduct of prevailing party, (4) Accident and surprise, (5) Lack of reasonable opportunity to present

his evidence, (6) "Erroneous rulings of the Court", (7) "Erroneous instructions given by the Court", (8 and 9) "The verdict was given under the influence of passion and prejudice" and "is in whole or in part contrary to the evidence", (10) Newly discovered evidence, (11) "The verdict is contrary to law."

Overruled May 21, 1913.

JOURNAL ENTRY OF JUDGMENT.

Recites the appearance of parties, introduction of plaintiff's testimony, demurrer to plaintiff's evidence and overruling thereof, introduction of defendant's evidence, instructions to the jury, return of verdict, filing of motion for new trial on same day, overruling of same on May 21, and of entering of judgment against defendant for $2973.36 with interest and costs.

NOTICE OF APPEAL.

In statutory form, gives notice of appeal from the order overruling motion for new trial and from the judgment. Dated Nov. 7, 1913. Served Nov. 8, 1913. Filed Nov. 14, 1913.

The foregoing abstract is correct.

W. F. CHALLIS,
Westmoreland, Kansas,
LEE MONROE,
JAS. A. McCLURE,
C. M. MONROE,
Topeka, Kansas,
Attorneys for Appellant.

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Be it further remembered that thereafter on the 1st day of June, 1915, there was filed in said cause by the aforesaid appellee a counter abstract of the record in the words and figures, to-wit:

Filed June 1, 1915. D. A. Valentine, Clerk Supreme Court.

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In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Counter Abstract.

Plaintiff commenced this action in the District Court of Pottawatomie County, on March 19, 1906, by filing its petition as follows:

PETITION.

Comes now the above named plaintiff, and for cause of action against the defendant, alleges that it is a corporation duly organized and existing under the laws of the State of Kansas and having its prinicpal office and place of business at the City of Salina, Kansas.

That on or about the ..... day of October, 1904, the

defendant entered into a verbal agreement and contract with this plaintiff whereby he employed plaintiff as his agent to sell for him the following described real estate, to-wit: all of section 35, in township 12 south, range 36 west, the east half of the northwest quarter, the northeast quarter and the east half of the southeast quarter of section 2; all of section 1; all section 11 and all of section 15; all in township 13, south, range 36 west of the 6th P. M. in the County of Logan and State of Kansas. The said defendant then represented to J. E. Putnam, who was then and there the duly elected, qualified and acting vice-president of the plaintiff corporation, and who was then and there duly authorized by plaintiff to make and enter into said verbal agreement with the defenadnt, that defendant had not perfected the title to one quarter section of said land, to-wit, the east half of the east half section 2, but that it was a part of defendant's ranch and property belonged to said ranch, and under the terms of any sale which plaintiff should make of said real estate, said quarter section should be included therein, and that defendant would convey to any purchaser all of his right, title and interest in and to said quarter section. Defendant then and there verbally promised and agreed with the plaintiff, acting through its vice-president so duly authorized to act in the premises, that if the plaintiff should find a purchaser for said real estate, he would pay the plaintiff as a commission for its services in procuring such purchaser all of the purchase price of said real estate above the sum of Eight Thousand Dollars ($8,000.00.) And defendant further agreed with plaintiff that upon the payment to him of the sum of Eight Thousand Dollars ($8,000.00) as the purchase price of the real estate hereinbefore described, he would execute to any purchaser good and sufficient deeds of conveyance of said real estate other than said east half of east half of section 2, and that he would convey to any purchaser of said real estate his interest in said quarter section last mentioned.

Plaintiff further states that on or about the 25th day of November, 1905, in pursuance of said verbal agreement and contract of employment with the defendant hereinbefore set out, it procured one F. D. Shellabarger of the City of Salina, Kansas, as a purchaser for the real estate hereinbefore described. That the said F. D. Shellabarger offered to purchase the said real estate for the sum of Ten Thousand and

Eighty ($10,080.00) and accept the title thereto upon the terms and conditions hereinbefore set forth, and, plaintiff duly accepted said offer so made by the said F. D. Shellabarger. Said Shellabarger paid to plaintiff the sum of One Thousand Dollars ($1,000.00) as part payment of the purchase price of said real estate, and agreed to pay the balance of said sum of Ten Thousand and Eighty Dollars ($10,080.00) in cash upon receipt of proper deeds of conveyance of defendant's title to said real estate, except said east one-half of the east one-half of section 2 and the conveyance of his interest in said quarter section, the title to which he did not have. Plaintiff duly notified the defendant of said sale of said real estate on or about November 26, 1905, and made demand upon defendant for his deeds of conveyance of said real estate and his interest in said east one-half of the east one-half of said section 2 as hereinbefore set forth, to the said purchaser, F. D. Shellabarger. Thereupon the defendant refused and ever since said date has wholly neglected and refused to complete said sale of said real estate to the said F. D. Shellabarger, and has wholly neglected and refused to convey to the said F. D. Shellabarger the title to said real estate, except said east one-half of the east one-half of said section 2, and his interest in said last named quarter section, and has wholly neglected and refused to comply with the terms and conditions of said sale upon his part. Plaintiff further states that the said F. D. Shellabarger was upon said November 25th, ever since has been and now is ready and willing to accept conveyance to him of title to said real estate, except said quarter section, the title to which defendant does not hold, and to accept a conveyance to him of all the interest of the said defendant in and to said last named quarter section, and was then, ever since has been and now is, ready, willing and able to pay the purchase price of said real estate to defendant, and repeatedly offered so to do; and on or about the 20th day of December, 1905, duly made tender of the full amount of the purchase price of said real estate to the said Putnam Investment Company for the benefit of the said defendant, and offered to and did fully comply with all the terms and conditions of said contract of purchase of said real estate upon his part.

Plaintiff further states that it has complied with all the terms and conditions of said verbal contract of employment

to procure for the defendant a purchaser of said real estate upon the terms hereinbefore mentioned, and nothing remains to be done by it under the terms of said verbal contract of employment with the defendant, and it has fully earned its commission for its services in that behalf, in the sum of Two Thousand and Eighty Dollars ($2,080.00). There is now due to the plaintiff from the defendant the sum of Two Thousand and Eighty Dollars ($2,080.00), with interest thereon from the date of filing this petition, at the rate of six per cent per annum.

Wherefore, plaintiff prays judgment against the defendant for the sum of Two Thousand and Eighty Dollars ($2,080.00) with interest thereon from the date of the commencement of this suit, at the rate of six per cent per annum, and for the costs of this action.

Answer.

Now comes the defendant and denies each and every statement and allegation contained in the petition of the plaintiff.

H. C. King, Defendant.

Filed 13th day of April, 1906, E. S. Francis, Clerk of the District.

Amended Answer.

Now comes the defendant, and makes and files this, his amended answer, and for his answer to plaintiff's petition herein filed admits that he was the owner of the land described in the petition, except the east one-half of the east one-half of section 2, in township 13, south of range 36 west of the 6th P. M. which tract of land was government land, and defendant denies each, every all and singular the other allegations and averments contained in said petition.

W. F. CHALLIS,
Attorney for Defendant.

State of Kansas,
Pottawatomie County, ss:

H. C. King being first duly sworn says that he is the defendant in the above entitled action, that he denies, under

oath, that he at any time made, constituted or appointed the said J. E. Putnam as his agent for the sale of said premises, as alleged in the petition, or any part thereof, and denies the authority of said Putnam to act for him as such agent.

H. C. KING.

Subscribed and sworn to before me this 4th day of March, 1907.

M. L. BARR, *Probate Judge.*

SECOND AMENDED PETITION.

Now comes the defendant and makes and files this his amended answer, and for his answer to the plaintiff's petition herein filed admits that he was the owner of the land described in the petition, except the east one-half of the east one-half of section 2, in township 13, south of range 36, west of the 6th P. M., which tract of land was government land and defendant denies each, every, all and singular the other allegations and averments contained in said petition.

W. F. CHALLIS,
Attorney for Defendant.

STATE OF KANSAS,
Pottawatomie County, ss:

H. C. King, being first duly sworn, says that he is the defendant in the above entitled action; that he denies under oath that he at any time made, constituted or appointed said J. E. Putnam, or the said Plaintiff, The Putnam Investment Company, or any of its officers, as his agent for the sale of said premises, or for any other purpose, as alleged in the petition, or any part thereof, and denies the authority of said Putnam or the said plaintiff, The Putnam Investment Company, or any of its officers, to act for him as such agent.

Thereafter, by leave of Court, plaintiff was permitted to re-file its reply, which is as follows:

REPLY.

Comes now the said plaintiff, and for its reply to the de-

fendant's amended answer filed herein, denies each and every material allegation in said amended answer contained, save and except such as are consistent with the allegations of the petition herein.

Salina, Kansas, Feb. 16, 1905.

H. C. King,
Oldsburg, Kansas.
Dear Sir:

Some time ago when talking with you on the train, you informed me that you had 2,720 acres in sections 1, 2, 11 and 15, all in 13-36, and all of section 35 in 12-36 which you would sell at $3.00 per acre. If we can locate you a buyer, what commission will you pay? Kindly let me hear from you and oblige,

Respectfully,

J. E. PUTNAM.

Written in ink upon that letter, Mr. King's reply was as follows:

You can have all you get over $8,000.00. Would sell it on time same as U. P. Land Company, but I should want a trifle more and would price it at $3.25. In that case, I would give you a reasonable commission. Kindly write me proposition. On ten years you must collect as first payment one-tenth plus your com.

Very truly yours,

H. C. KING.

H. C. King,
Oldsburg, Kansas.
Dear Sir:

Salina, Kansas, Sept. 25, 1905.

We had some correspondence with you about 2,720 acres out in Logan Co. some little time ago, and you made us a price of $8,000.00 net to you. Please advise us if it is all right to sell on this basis and you allow us the excess we can procure above that sum. We have an eastern party now who we believe will buy the place, but he is dealing through two other agents with whom we must divide, consequently would want it understood that you will protect us in the price of $8,000.00 net to you in case of sale. Let us know

what amount you would be willing to take down and the terms on the balance. Kindly let us hear from you by return mail and oblige.

Yours truly,
J. E. PUTNAM, *V. Pt.*

Salina, Kans., Oct. 2, 1905.

H. C. King,
Oldsburg, Kans.
Dear Sir:

We wrote you some days ago regarding land in Logan County, but so far have received no reply. Will you kindly advise us if the figures given us last spring on this property are still good, and what amount you would be willing to carry on the property, and what rate on deferred payments on the land. On receipt of your reply, will see what we can do toward disposing of the same for you.

Yours truly,
THE PUTNAM INVESTMENT CO.

Written in ink upon this letter, Mr. King's reply was as follows:

Yes I still have the land. Would like $1.00 per A. cash, bal. 6 pr. ct. I might consider other terms. Will likely pass through your place the 9", also abt. 12 or 13." If you want to see me abt this notify me here before the 9" and Winona to the 12."

Very truly yours,
H. C. KING.

Salina, Kansas, 11, 25, 1905.

Pay to the order of the Putnam Investment Co. $1,000.00, One Thousand and no-100 Dollars.

Shellabarger Mill and Elevator Co.,
To Planters State Bank, F. D. Shellabarger,
Salina, Kansas. Secretary.

Salina, Kans., Nov. 28, 1905.

H. C. King,
Oldsburg, Kans.
Dear Sir:

We received your wire yesterday in answer to ours of the

25th regarding sale of Logan County ranch of 2,880 acres. From the same we inferred that you had written us as to when and where we should meet you to close sale, but as yet no letter has reached us.

We have sold this property on the basis of the price given our Mr. J. E. Putnam some time ago, namely $8,000.00 net to you. We are ready to close sale as soon as an abstract showing clear title is received and approved by the purchaser's attorney. We hold $1,000.00 as an evidence of good faith and have given contract in accordance with above terms.

If there are any railroad contracts covering all or a portion of this property we think the purchaser would be willing to take assignment of same. Would like very much to have you come to Salina at once in order that this transaction can be closed. Kindly wire us at our expense when you will be here, in order that our Mr. Putnam can arrange to be in town to meet you.

Yours truly,

J. E. PUTNAM, *V. Pt.*

Olsburg, Kansas, Nov. 27, 1905.

Putnam Investment Co.,
Salina, Kansas.

Gentlemen:

Your telegram received but I do not quite understand it. The 2,810 acre ranch I sold some time ago. I still have the 2,720 acres southwest abt 6 or 7 miles of Winona and abt 3 miles south of Lisbon on the U. P. On this tract I am considering a proposition now and party wants until Dec. 1st, and in the absence of any other definite offer, I think I will try him. If he does not take it I shall be glad to consider a proposition for its purchase and will not take further offers until I hear from you.

Very truly yours,

H. C. KING.

Nov. 29, 1905.

H. C. King,
Olsburg, Kansas.

Dear Sir:

Your letter of the 27th arrived last night, after we had written you giving terms upon which the land was sold. We

are also in receipt of your telegram of today, "Party has three days absence," which we do not understand. As to the sale would say our telegrams and letters refer to the only ranch upon which you gave us price and terms of sale, and which you specifically described to our Mr. Putnam as follows: E. ½ of E. ½, W. ½ N. E. ¼, and E. ½ N. W. ¼ of Sec. 2, all of Sec. 1, all of Sec. 11, all of Sec. 15, all in town. 13-36, and all of Sec. 35 in town. 12-36, Logan Co., Kansas. We have made this sale strictly in accordance with your letters of advice to us, and our purchaser insists upon closing up this sale at the earliest possible date. Please forward abstracts of this land for examination and advise us when you will be here to close sale.

Yours truly,
THE PUTNAM INVESTMENT CO.,
By J. E. PUTNAM, *V. Pt.*

Putnam Investment Co.,
Salina, Ks.
Gentlemen:

I have just returned home and your telegrams and letters were awaiting me. I think it better to write you again instead of wiring you. As I wrote you before, you have either sold land I never described to you, or you made error when you wrote to me as to the numbers and I could not depend definitely on your proposed sale. You wrote or wired some days ago that you had sold ranch of 2,810 acres and now you have 2,880. It was on account of this I gave party option to December 1st on my 2,270 acre tract, but do not know anything in the way of my selling it now only I don't want to treat anyone badly and I would like to give the party a chance for his money, although if I could get $3.00 per a. cash it would be better than I would get if the holder of the option should come to time. If he does not take it and you can get your party to take the 2,720 acre place I will let you have it at $8,000 net—I pay no taxes for this year —or $5,000 for my equity, as it is covered with land contracts, on which there is due $3,260, on which I am told I get 10 pr ct off if paid before due. In order to get this on the mail I have not figured over the proposition, but is it based on $3.00 pr A. cash. There would not be any need of a trip to your place if we should deal. If you pd cash put in bank. The U. P. Land Co. will deed you the property

except 160 A. which our company will deed and place in bank. Write me at once if you will take it if holder of option fails to do so.

Very hastily yours,

H. C. KING.

Salina, Kansas, Dec. 9, 1905.

H. C. King,
Olsburg, Kans.,
Dear Sir:

Yours of the 6th regarding the Logan County ranch is received, and regarding the discrepancy in the number of acres referred to in your letter, we believe that if you will look up our telegram you will find that same stated 2,880 acres and not 2,810. We arrived at these figures through the description given our Mr. Putnam. It seems that the difference in the acreage arises through including the W. ½ N. E. ¼ and the E. ½ N. W. ¼, Section 2 which we understand is included as a part of the ranch. Now as to the sale of this property, as previously advised you, we have sold this absolutely, and in accordance with the price you gave us,—namely $8,000.00 to you, and have given contract covering same. There are no reservations as to taxes and the purchaser certainly does not expect to pay the same for 1905. We wish it understood most emphatically, that our sale was not made on condition that some other party should not take it, but that it was a sale outright and unqualified. As before stated, we hold $1,000.00 on account of this sale, and our man stands ready to complete the deal at this time. From your letter we take it that there is nothing in the way of closing this sale, with the exception that you now ask that the 1905 taxes be paid by the purchaser and that you prefer to give some other party the preference, neither of which we recognize. Our client will expect this sale closed in accordance with the agreement, and as it is a good sale, why can't you run up here and get this sale closed? I am satisfied that with a few moments' conversation everything can be settled satisfactory to both parties. What is the condition of the title to the W. ½ N. E. ¼ and E. ½ N. W. ¼, Section 2, and what title or interest have you in same, and what sort of conveyance of that interest could be made? If it has not been proved up on, could not relinquishment or assignment of the present interest be ar-

ranged, so as to eventually give Mr. Shellabarger good title! Trusting that we can get this matter promptly closed, we are,

Yours truly,
J. E. PUTNAM, *V. Pt.*

Olsburg, Kansas, Dec. 27, 1905.

Putnam Investment Co.,
Salina, Kansas.

Gentlemen:

I got your telegram today but was not able to understand it, but take it that you wished me to meet a Mr. Salabarger at Manhattan last Saturday in the interest of land deal. For obvious reasons I could not do so, and as you also insist that it is 2,880 acres as pr your last letter although I repeatedly said to you I only had 2,720 acres, I don't see the use of going if I could. Your mistake is not in including E. ½ of N. W. and W. ½ N. E. of 2 as I have warrantee deed for it. Nor can I see where you are wrong, as you do not give me description or legal numbers of which this 2,880 acres is composed. Your proposition for the sale of 2,880 acres came at a time when I had an offer for option. I had rather sold to you on terms that you name than sell option, but I reasoned if you had sold 2,880 acres it could not be construed as a sale of my 2,720 A. so I sold option which has expired, but I am letting time run on to give party a chance to sell it. If you did not speak of the land in 2 would think you had got a description of another property I had a year or so ago but that had no land in Sec. 2. I would meet Mr. Sallabarger at Manhattan if any good could come of it, but it would be necessary for me to name date. I have been away from home much of the time for three months, but will be here most of the time for thirty days and will reply promptly any enquiry.

Yours very truly,
H. C. KING.

Olsburg, Kansas, Jany 1, 1906.

J. T. Putnam,
Salina, Ks.

Dear Sir:

I got your telegram but could not get operator to send reply so will send by mail. If option is not paid out I will

wire you date to meet you in Manhattan inside of two weeks or I may stop off at Salina and call on you.

Yours very truly,

H. C. KING.

Mr. Putnam further testified:

Mr. King has neither written, nor wired, nor talked to the plaintiff since I received Exhibit H. and I have had no communication from him in reference to the matter from that time until the date of the first trial.

TESTIMONY.

H. C. King, Direct Examination.

Q. I hand you paper marked Exhibit "C" and you may state if you received from the Putnam Investment Co. a telegram on or about the 25th of November, of that type or of which that is a copy?

A. I don't remember that I did.

Q. You remember having received a telegram from The Putnam Investment Co. November 25, concerning the sale of the Logan County ranch, do you not?

A. I remember getting information some way, I don't know whether by telegram or letter.

Q. To refresh your memory, did you not receive a telegram, and did you not send one right back?

A. Possibly I did, but I don't remember.

Q. Calling your attention to paper marked exhibit "D", you sent that telegram, did you, yourself.

A. I think probably I did. These telegrams that were received were mixed up, but having received a good many, I don't know.

Q. By refreshing your recollection, after looking at Exhibit "B" don't you remember as to whether or not you received the telegram from the Putnam Investment Company concerning a sale of the Logan County ranch?

A. Well, I received the information some way.

Q. You may state whether you had a son by the name of Arthur C. or A. C. King?

A. Yes, sir.

Q. In the fall of 1904?

A. Yes, sir.

Q. You may state where he was living at that time and had been for some time?

A. He was living on the ranch in Logan County, Kansas.

Q. And how long had he been living there in October, 1904?

A. Three or four years, I think.

Q. I hand you Exhibit "P." You may state whether or not you ever saw that document until the time of the first trial of this case.

A. If I ever saw it?

Q. I asked if you ever saw it before the first until the first trial of this case?

A. No, sir.

Q. I want to ask you this question—why was it, Mr. King, that you did not complete this sale to Mr. Putnam, when he told you he had found a buyer?

A. Because they wanted 160 acres more land than I had. They wanted title to 160 acres more land than I had.

Q. Was there any other reason why you did not complete that sale?

A. There was an option stood in the way part of the time. I had sold an option on the land. Of course when the option run out if he would have taken the number of acres that I had I would have let them have it.

Q. And you say you never heard of this contract until the first trial of this case?

A. No, sir.

Q. That is not your signature is it?

A. No, sir.

Q. When did you first hear of this man Shellabarger?

A. I don't remember; I heard——I don't remember when I did first hear of him.

Q. I mean in connection with this land deal—did you ever hear of him until the commencement of this law suit?

A. I don't think I did.

Re-Cross Examination.

Q. Now, Mr. King, you just said you had not heard about Mr. Shellabarger up until the time of the commencement of this suit?

A. I said I did not remember.

Q. But you don't mean that, do you?

A. I don't remember hearing until the commencement of this suit.

Q. Well, you have written about him, have you not?

A. Wrote about Shellabarger?

Q. Yes.

A. Not that I remember of; possibly I did, but I don't think I ever did.

Q. On December 27th you wrote about him, did you not?

A. It is possible, but I don't remember about it now. Yes, that is, to Mr. Putnam there.

Q. You said "I take it that you wired me to meet Mr. Shellabarger in Manhattan last Saturday in the interest of the land deal."

A. I had forgotten about that.

Q. Then at the last end of the letter you say: "I would meet Mr. Shellabarger at Manhattan if any good could come of it," did you not?

A. Yes, sir.

Q. That is the letter of December 27th, is it?

A. That is my letter all right.

Q. Then don't you recall having gotten a telegram to the effect that Mr. Shellabarger made a tender of the balance of the money and wanted you to come through with the trade?

A. I don't remember that he did. I remember that he said that somebody was ready with the money, but I don't know whether it was the party that bought it or whether he named the party definitely.

Q. But you did have some information to the effect that Mr. Shellabarger or somebody had the money and tendered the balance of the purchase price?

A. I understood that Mr. Putnam said so.

J. E. Putnam's testimony. Direct examination.

Q. Up to the time that you had signed this Exhibit "P" had you received any communication in writing from Mr. King, or your company, except the writing in ink upon the back of the two letters marked Exhibits "A" and "B"?

A. I had not.

Q. Or from anybody purporting to represent him in any way?

A. I had not.

Q. And from October, 1904, up until the time suit was brought did you have any verbal conversation with Mr. King at all?

A. I did not.

Q. Or with anybody who pretended to be acting for him?

A. I did not.

Q. You may state whether you sent Mr. King a copy of Exhibit "P" at any time?

A. I did not.

Q. Or ever show it to him at all until the first trial of this case over in Pottawatomie County?

A. No, sir; I never did.

Q. And then you never communicated to him in any manner its terms and conditions except as mentioned in the letters which have been introduced and read in evidence?

A. No, sir.

Re-direct examination.

Q. Now with reference to the matter of abstracts, state whether or not it was in the fall of 1905 the custom in central and western Kansas for a seller of real estate to furnish abstracts of title?

A. It has always been the custom to furnish abstracts of title whether asked for or not.

C. W. BURCH,
B. I. LITOWICH,
Both of Salina, Kansas,
Attorneys for Appellee.

Be it further remembered that afterwards on Monday, June 7, 1915, the same being one of the regular judicial days of the January, 1915, term of the State of Kansas, said court being in session in its court room in the city of Topeka in said state, the following proceedings, among others, were had and remain of record at page 510 of Journal "U U" in the words and figures following, to-wit:

19141.

PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Topeka, Monday, June 7, 1915.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Jackson County; and thereupon after oral argument by Lee Monroe and C. M. Monroe for the appellant, and by C. W. Burch for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

Appellant allowed until Tuesday, the 15th day of June, within which to serve and file reply brief.

Be it further remembered that afterwards on Saturday, the 10th day of July, 1915, the same being one of the regular judicial days of the July A. D. 1915 term of the Supreme Court of the state of Kansas said court being in session at its court room at the city of Topeka in said state the following proceedings, among others, were had and remain of record in the words and figures following, to-wit:

19141.

THE PUTNAM INVESTMENT CO., Appellee,
v.
H. C. KING, Appellant.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed*. It is further ordered that the appellant pay the costs of this case in this court taxed at $....., and hereof let execution issue.

Johnston, C. J., delivered the opinion of the court. All the Justices concurring.

On the same day, to-wit: the 10th day of July, 1915, there was filed in the office of the Clerk of the Supreme Court of the state of Kansas, the syllabus and opinion of the said Supreme Court which syllabus and opinion are in the words and figures following, to-wit:

No. 19,141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Appeal from Jackson County, Affirmed.

Syllabus by the Court.

JOHNSTON, C. J.:

1. In the employment of a broker to procure a purchaser for certain lands it is held that the agreement did not contemplate a sale of public lands in contravention of the federal laws.
2. A competent purchaser was procured by the broker and when the land owner was notified that one had been found that was ready, able and willing to buy the land on the agreed terms he refused to complete the sale, basing his refusal upon certain objections, and upon the trial of an action brought by the broker to recover the commission the land owner asserted other grounds . *Held,* that having put his refusal to complete the sale on particular grounds he, in effect, waived any defenses based upon other grounds. *Held, also,* that the reasons asserted when the refusal was made or those subsequently set up in the trial were not good grounds for his refusal.
3. If an agreement for the sale of land does not specify nor indicate the character of the conveyance to be made the law will imply that a deed with the usual covenants of warranty is to be executed.

The opinion of the court was delivered by

JOHNSTON, *C. J.:*

This was an action by The Putnam Investment Company, a corporation engaged in the real estate brokerage business, against H. C. King for the recovery of a commission. From a judgment in favor of the plaintiff King appeals.

The case has been here twice before (Putnam v. King, 82 Kan. 216, 107 Pac. 559; 87 Kan. 842, 126 Pac. 1093), and in the former of these appeals the principal facts involved are concisely stated. King owned 2720 acres of land and in connection with this land he used 160 acres of government land upon which his son had filed. He verbally agreed with the manager of the plaintiff to the effect that plaintiff should find a purchaser for the land and retain all over $8000 as commission. A party able and willing to purchase the interest which King had in the land for

$10,800 was found by the plaintiff and King then declined to make a conveyance. After several trials in the Pottawatomie district court a change of venue was granted and the case was tried in Jackson county, resulting in a judgment for the plaintiff. Defendant's demurrer to the evidence of plaintiff was overruled as was also his motion for a new trial.

It is first insisted that the plaintiff can not recover because the contract made by plaintiff in behalf of defendant included the sale of government land. It sufficiently appears that no one contemplated a sale or purchase of public land. When the contract was made between plaintiff and defendant it was mentioned that 2720 acres was subject to sale and that 160 acres used in connection with the larger tract was government land upon which the defendant's son had a filing. (Of course, any attempt to sell or mortgage government land is contrary to statute as well as public policy and would be without effect.) While this quarter section of land was spoken of as a part of the ranch it was understood that it was government land and therefore not subject to sale. It was equally well known that improvements as well as certain preferences of one having a filing upon government land were subject to be transferred. It has been said that:

"Under the laws of the United States, and the rules of the land department, the entryman is entitled to commutation in several forms, and to certain preference rights, and may also relinquish and sell his improvements and equities in the homestead to another. The relinquishment must, of course, be made to the United States; but under the rules and practice of the land department it may be made so as to fully protect the transferee, if he be a qualified person, to the same right which his vendor enjoyed." (B. K. & S. W. Rld. Co. v. Johnson, 38 Kan. 142, 151, 16 Pac. 125;
James S. Moore v. Daniel M. McIntosh, 6 Kan. 39;
Bell v. Parks, 18 Kan. 152;
Lapham v. Head, 21 Kan. 332;
Hardesty v. Service, 45 Kan. 614, 26 Pac. 29.)

There was some talk between the parties about the son perfecting his title or giving a relinquishment if it was not perfected but the evidence of the plaintiff was that the purchaser was to get just such interest as the defend-

ant could give and if he had no interest in the tract the purchaser would get nothing. When the plaintiff bargained with the proposed purchaser a writing was made which purported to include 2880 acres and the plaintiff attached the defendant's name to the writing without authority. This writing was, of course, invalid in that it included the 160-acre tract of government land but that writing is not the basis of this action. The action brought rests upon the agreement that plaintiff was to find a purchaser for the four and a quarter sections of land and such interest as the defendant might have in the other quarter, together with the compliance by the plaintiff with the terms of that agreement. The plaintiff and the purchaser soon discovered that the writing as drawn was invalid and it was never brought to the attention of defendant nor did he learn of the existence of the writing until after the litigation had been begun. Besides, the agreement actually made with Shellabarger, the purchaser, did not undertake to sell government land nor to make a transfer of it in contravention of the federal laws. It may also be said that defendant did not decline to carry out his agreement nor to transfer the land to the purchaser on account of the terms of this writing and he could not well have based his refusal on that ground as he admitted that he did not see the contract until the first trial of this case.

The next contention of the defendant is that the plaintiff did not procure a purchaser for the land who was ready and willing to buy on the terms agreed upon. There is no substantial dispute that the plaintiff was empowered by defendant to find a purchaser for the land very little as to the terms of the agreement made between them when the land was listed with plaintiff. The defendant prescribed several plans on which a sale might be made, one of which was that if sold for cash he would take $8000 net, the plaintiff to have any additional sum that it could procure as commission. In a letter written about four months later the defendant repeated the statement and said to the plaintiff, "You can have all you get over $8000." The plaintiff found a purchaser who offered to pay $10,800 for the land and who then made a payment of $1000 to the plaintiff as the agent of the defendant. When the defendant was notified that a purchaser had been procured on the prescribed terms he raised a number of objections

and indicated a purpose to avoid compliance with the contract. He first raised a question as to the description and extent of the tract that he had for sale, saying that plaintiff had either sold land which had never been given it for sale or had made an error in the description of the land offered to the proposed purchased. He also said that he had given an option to a party on his 2720 acres. Defendant insists that while plaintiff had found one who was willing to take the land at the specified price the purchaser had made a requirement that defendant should furnish an abstract of title and should execute a warranty deed to the land and that neither of these conditions had ever been agreed to by the defendant. In the first place the defendant did not refuse to complete the sale on either of these grounds. He never mentioned them when plaintiff notified him that a purchaser had been found and when the request was made that he complete the sale. His refusal was based upon the grounds that more land was sold than he owned and that he had given an option to another upon the land listed with the plaintiff. Having put his refusal on these grounds he, in effect, waived any defense based on the requirement of an abstract or of the form of the conveyance to be executed. As said in Sandefur v. Hines, 69 Kan. 168, 76 Pac. 444:

"It is not becoming in him to place his refusal on one ground, and, when the plaintiff has been driven into litigation to enforce the contract, to defend his refusal on another and wholly different ground." (P. 171.)

In a later case it was said:

"If this had been a reason for refusing to complete the sale he should have so stated at the time, so that the other party might know what was lacking and possibly correct it." (Stanton v. Barnes, 72 Kan. 541, 544, 84 Pac. 116.)

Aside from this consideration it appears that the furnishing of an abstract of title was not insisted on by the plaintiff or the purchaser. In a letter of plaintiff notifying defendant of the sale it was said that the purchaser was ready to close the sale as soon as abstracts showing clear title were received and in another letter defendant was requested to "forward abstracts of this land for examination and advise us when you will be here to close sale." In his replies to these letters defendant never mentioned this detail of the transaction and the plaintiff advised the purchaser that if defendant did not furnish abstracts the

plaintiff itself would do so. There was, in fact, no controversy over abstracts and it can not be regarded as a real issue in the case.

Neither was there any basis for his refusal to complete the sale because of the form of the deed conveying defendant's interest in the land. This defense was an afterthought. In none of his letters did the defendant speak of the kind of a conveyance that was to be made of his land and there was no stipulation on this subject in the agreement under which the land was listed for sale with plaintiff. While no mention was made as to the form of conveyance to be executed it has been held that:

"In the sale of real estate it is not necessary in this state that the form of deed be contracted for. In the absence of express stipulation covering the subject a deed with the usual covenants of warranty is implied." (Dewey v. Hines, 87 Kan. 834, syl. par. 1, 126 Pac. 1093; 39 Cyc. 1556.)

Although a warranty deed was mentioned in the writing made with the purchaser by plaintiff this memorandum was recognized by both plaintiff and purchaser to be invalid and was not even presented to defendant. It was understood throughout the dealings that defendant did not have a complete title to all of the land as part of it was held under a contract with the railroad company and also that a quarter section of the same was government land upon which defendant's son had a filing. In one of plaintiff's letters to the defendant it was stated that the purchaser would take assignments of railroad contracts under which defendant held a part of the land. The purchaser was, however, ready to take the title which defendant had represented that he held when the land was listed for sale with the plaintiff and, besides, the defendant did not misunderstand the agreement nor the disposition or ability of the purchaser to take the land on the agreed terms.

It is true that plaintiff did not have the exclusive right to sell the land and that if defendant had made a sale of the land before the plaintiff had found a purchaser the defendant would not have been liable to pay a commission to plaintiff but it is conceded that he never effected a sale of the land. He speaks of having given an option of purchase to some one but he admitted that the option had expired before the correspondence as to the closing of the

sale made by plaintiff had ended. Aside from this consideration the defendant did not plead that a sale of the land had been made to another as a defense. Of the agency of the plaintiff there is no question and that a purchaser was procured able, ready and willing to take the land upon the agreed terms was well established. The defendant was notified that a competent purchaser had been procured. The reasons advanced by him for declining to accept the purchaser and complete the transaction are obviously insufficient. The plaintiff's part of the agreement was substantially carried out and the commission was earned.

We find nothing material in the objections to the rulings on the admission of testimony nor in the instructions of the trial court.

The judgment is affirmed.

Be it further remembered that afterwards on the 14th day of July, 1915, there was filed in the office of the Clerk of the Supreme Court of the state of Kansas a petition for a rehearing of this cause in the words and figures following, to-wit:

Filed Jul. 14, 1915, D. A. Valentine, Clerk Supreme Court.

No. 19141.

In the Supreme Court of the State of Kansas.

THE PUTNAM INVESTMENT COMPANY, Appellee,

v.

H. C. KING, Appellant.

Petition for a Rehearing.

Comes now the appellant and moves the court to grant a rehearing herein for the reason that the original contract of employment sued on in this cause, as alleged in the appellee's petition, testified to by its president at the trial and proven by other evidence, was against public policy and void for that it undertook to obligate the appellant to sell and convey or secure a conveyance by his son, Arthur C. King, for a certain tract of land, the title to which was vested in the United States and for which

original entry had been made under sections 2289 and 2290, Revised Statutes of the United States, commonly known as the Homestead Law, but for which no final entry had been made under section 2291 of said Revised Statutes or final certificate or patent issued, and purported also to bind the appellant to pay to the appellee for services in procuring a purchaser to enter into such void and illegal contract.

This was one of the defenses set forth in the appellant's answer, viz.:

"Now comes the defendant, and . . . admits that he was the owner of the land described in the petition, except the East One-Half of the East One-half of Section 2. . . . which tract of land was Government land." (Abst. p. 3.)

There appears to be no dispute about the law upon this question. Opposing counsel did not claim either in his brief or oral argument, that a contract looking toward the sale of government land was valid. In the opinion herewith it is correctly stated: "Of course, any attempt to sell or mortgage government land is contrary to statute as well as public policy and would be without effect." In affirming the judgment herein, the court apparently overlooked certain facts which we beg to call to its attention, viz:

First: The trial court charged the jury that:

"Upon the agent's producing a purchaser ready, willing and able to purchase such property or such interest therein, at the price and on the terms agreed upon by such owner and his agent, he is liable to the agent in an action for the commission stipulated in the contract of agency, whether the property belonged to the principal or another."

This was tantamount to a charge that it was immaterial that one of the tracts of land which the appellant had employed the appellee to sell, was a government homestead covered by his son's filing. Under this instruction, he must consumate the sale or be held liable for commissions. Hence, if there was an admission in the pleadings or any proof tending to show that the contract of employment contemplated a sale of government land, the instruction was erroneous and the case should be reversed.

Second: The plaintiff alleges that the land which the appellant employed the appellee to sell, contained not only his own 2,720 acres, but the quarter section covered by his son's homestead entry as well. This allegation was as follows:

"That the defendant had not perfected the title to one quarter section of said land, to-wit, the East Half of the East half of said section 2 but that it was a part of defendant's ranch and properly belonged to said ranch, and under the terms of any sale which plaintiff should make of said real estate said quarter section should be included therein, and that defendant would convey to any purchaser all of his right, title and interest in and to said quarter section." (P. 2.)

This we submit was such an unequivocal admission of fact as to obviate the necessity for further proof.

Third: The appellee's president, J. E. Putnam, testified upon the trial relative to the contract of employment as follows:

"Q. You may state what further was said in this conversation concerning this matter. A. Well, he went into a general discussion, the description, etc. . . . He stated . . . there was a spring on one quarter in 2 of the homestead quarter. He stated that was a homestead that was not proved up, that it was held under a filing by his son, that this homestead would go—whatever interest he had, that he did not have title to it, but whoever purchased the property would get what title he had, or rather what title his son had and he would throw that in with the ranch so that the party purchasing could control this tract." (P. 12.)

This we say, was a square toed statement that a conveyance of government land was contemplated because "whoever purchased the property" would not get "what title his son had" unless the son made some sort of conveyance thereof.

Fourth: The original offer of F. B. Shellabarger to purchase was evidenced by a written contract set forth in pages 17 to 19 of the abstract which required the appellant to convey the entire 2,880 acres including the quarter section of government land by warranty deed. This is certainly *some evidence* that the offer to purchase, contemplated a conveyance of government land and that the purchaser would not have closed the transaction without such conveyance and it was for the jury to decide whether, in view of all the facts and circumstances, they believed Shellabarger was willing to close the transaction on any different terms.

Fifth: On Nov. 28, 1915, appellee's president apprised

the appellant by letter of the terms of the proposed sale which letter contained the following language:

"We received your wire yesterday in answer to ours of the 25th regarding the sale of the Logan County ranch of 2880 acres. . . . We have sold this property on the basis of the price given our Mr. J. E. Putnam sometime ago, namely $8000 net to you. We are ready to close the sale as soon as the abstract showing clear title is received and approved by purchaser's attorney. We hold $1000 as an evidence of good faith, and have given contract in accordance with above terms."

Surely when Mr. Putnam makes the above reference relative to "the sale of the Logan County ranch of 2880 acres" he includes the 2720 acres belonging to the appellant and the 160 acre tract covered by appellant's son's homestead. This reference to that acreage is surely *some evidence* that the parties contemplated a sale of the entire 2880 acres including the quarter section of government land.

Sixth: On Dec. 6, 1905, appellee's president wrote to the appellant as follows:

"Yours of 6th regarding the sale of the Logan County ranch is received, and regarding the discrepancy in the number of acres referred to in your letter, we believe that if you will look at your telegram you will find that it stated 2880 acres, not 2810. We arrived at these figures through the description given our Mr. Putnam. . . . Our client will expect this sale closed up in accordance with the agreement."

The "agreement" so referred to, undoubtedly was the one referred to in the foregoing letter of Nov. 28th written Mr. Putnam says that "we have given contract in accordance with the above terms." The only *agreement* that had been given to the prospective purchaser at that time, was the written agreement of Nov. 25th which both Putnam and Shellabarger then supposed was valid and continued to believe to be binding until apprised to the contrary by attorney Burch on the occasion of the conference between Shellabarger, Palmer, Liter, Burch and Putnam several days later. (P. 26.)

Seventh: In no subsequent communication did the appellee apprise the appellant of the fact, if it were a fact, that Shellabarger was willing to make the purchase unless he received a conveyance of some sort for the entire 2880 acres of land. This fact is certainly *some evidence* tend-

ing to prove that Shellabarger all the time contemplated such conveyance and that the statement of Putnam made upon the trial to the effect that the purchaser afterwards consented to accept a conveyance of 2720 acres only, was a pure fabrication.

Under the foregoing and other instructions of the court this defense was entirely taken from the jury. To say the least, there was *some evidence* tending to support it. Under well recognized rules of procedure in Kansas, it was a reversible error, under such circumstances, to so take this issue from the jury.

For the foregoing reasons, the appellant prays that the order of the reversal herein be set aside and a rehearing granted.

W. F. CHALLIS,
LEE MONROE,
JAS. A. McCLURE,
C. M. MONROE,
Attorneys for Appellant.

Be it further remembered that afterwards on the 9th day of October, 1915, the same being one of the regular judicial days of the July, 1915, term of the Supreme Court of the State of Kansas said court being in session at its court room at the city of Topeka in said state, the following proceedings, among others, were had and remain of record at page 102 of Journal VV in the words and figures following, to-wit:

THE PUTNAM INVESTMENT CO., Appellee,
v.
H. C. KING, Appellant.

Topeka, Saturday, October 9, 1915.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is *ordered* that said petition for a rehearing be *denied*.

In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, in the case of The Putnam Investment Company, Appellee, v. H. C. King, Appellant, and also of the opinion of the court rendered therein, of the petition for a rehearing and of the order overruling said petition as the same now appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 3d day of December, 1915.

(Seal Supreme Court, State of Kansas.)

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the aforesaid Supreme Court in rendering judgment against him in the above entitled cause the appellant, H. C. King, hereby prays a writ of error from said decision and judgment to the United States Supreme Court for the correction of the errors complained of in the assignment of errors herewith filed, that an order be made fixing the amount of an appeal bond which is not to operate as a supersedeas, and that a transcript of the record proceedings and papers in this cause, duly authenticated, may be transferred to the Supreme Court of the United States.

Assignment of errors herewith.

LEE MONROE,
JAMES A. McCLURE,
C. M. MONROE,
Attorneys for Appellant.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of an appeal bond by the above named appellant, H. C. King, in the sum of $500.00 such bond when approved to act as security for costs but not as a supersedeas.

Dated November 24th, 1915.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 19141. Petition for Writ of Error. Filed Nov. 24, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
vs.
H. C. KING, Appellant.

Assignment of Errors.

Comes now the above named appellant, H. C. King, and files herein his petition for a writ of error and says there are errors in

the records and proceedings of the above entitled cause and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignments:

1. The said State Supreme Court erred in affirming the judgment of the District Court of Jackson County, Kansas, involved in this cause and in not reversing said judgment.

2. The said State Supreme Court erred in overruling the application of the said appellant, H. C. King, for a rehearing herein.

3. The District Court of Jackson County, Kansas, erred in failing to adjudge and hold that the contract sued on and testified to by J. E. Putnam, President of The Putnam Investment Company aforesaid was against public policy and void for that it purported to obligate the aforesaid H. C. King to sell, convey and transfer a certain tract of land, the title to which was vested in the United States and for which original entry had been made under Sections 2289 and 2290, Revised Statutes of the United States, commonly known as the Homestead Law, but for which no final entry had been made under Section 2291 of said Revised Statutes or final certificate or patent issued, and purported also to bind the appellant to pay the appellee for services in procuring a purchaser to enter into such void and illegal contract with him, the said H. C. King, and the said State Supreme Court erred in not reversing the said District Court in this regard.

4. The said State Supreme Court also erred in deciding and holding that the appellee The Putnam Investment Company was entitled to a recovery either upon the contract sued upon or upon the facts proven upon the trial for that it was thereby made to appear that the appellee's claim for such recovery was based upon a contract and a transaction contrary to public policy and void in that it purported to obligate the appellant, H. C. King, to sell, convey and transfer a certain tract of land, the title to which was vested in the United States and a transaction contrary to public policy and void in that it was violative of the provisions, spirit and intent of Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, all of which were well known to the appellee and its officers and agents at all times during the pendency of said transaction, for which errors the aforesaid H. C. King prays that the said judgment of the Supreme Court of the state of Kansas, dated July 10, 1915, be reversed and judgment rendered in favor of him, the said H. C. King, for costs.

LEE MONROE,
JAMES A. McCLURE,
C. M. MONROE,
Attorneys for H. C. King, Appellant.

[Endorsed:] 19141. Assignment of Errors. Filed Nov. 24, 1915. D. A. Valentine, Clerk Supreme Court.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Putnam Investment Company, Appellee, and H. C. King, Appellant, wherein was drawn in question the validity and application of a statute of the United States and wherein certain rights, privileges and immunities under a statute of the United States and wherein certain rights, privileges, and immunities under said statute of the United States set up, claimed, pleaded and relied upon by the said H. C. King, Appellant, as defenses in said action, by reason whereof a manifest error hath happened, to the great damage of the said H. C. King, Appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 24th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk District Court United States, District of Kansas.

Allowed November 24th, 1915.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 19141. Writ of Error. Filed Dec. 3, 1915. D. A. Valentine, Clerk Sup. Ct.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Putnam Investment Company, Appellee, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein H. C. King is appellant in error and you are appellee in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas this 3rd day of December, 1915.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

SALINA, KANSAS, December 7th, 1915.

We, the undersigned attorneys of record for The Putnam Investment Company, appellee in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

C. W. BURCH,
B. I. LITOWICH.
Attorneys for The Putnam Investment Company, Appellee.

[Endorsed:] 19141. Citation. Issued Dec. 3, 1915. Ret. & filed Dec. 10th, 1915. D. A. Valentine, Clerk.

In the Supreme Court of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
v.
H. C. KING, Appellant.

Bond.

Know all men by these presents, That we, H. C. King as principal and W. H. King as surety, are held and firmly bound unto The

Putnam Investment Company in the sum of Five Hundred Dollars to be paid to the said Putnam Investment Company, appellee, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 24th day of November, 1915.

Whereas the above named H. C. King, appellant in error, seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the state of Kansas.

Now, therefore, The condition of this obligation is such that if the above named H. C. King, appellant in error, shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea then this obligation to be void, otherwise to remain in full force and effect.

H. C. KING.
W. H. KING.

STATE OF KANSAS,
Chase County, ss:

W. H. King, as surety on the foregoing bond being duly sworn on oath deposes and says: I am of lawful age and a citizen of the state of Kansas and know the contents of the foregoing instrument and bond to which *we* have attached my name. I say that I am worth in excess of the sum of Three Thousand Dollars above all debts, liabilities and exemptions.

W. H. KING.

Subscribed and sworn to before me this 2 day of December, 1915.
[SEAL.] JAMES F. PARK,
Notary Public.

My Commission expires Feb. 3, 1919.

This Bond approved and not to operate as a supersedeas. Dated Dec. 3d, 1915.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

In the Supreme Court of the State of Kansas.

No. 19141.

THE PUTNAM INVESTMENT COMPANY, Appellee,
vs.
H. C. KING, Appellant.

Journal Entry.

Now on this 24th day of November, 1915, H. C. King, the appellant in this court and plaintiff in error in the United States Supreme Court, presented his petition for a writ of error in the above entitled cause together with an assignment of errors attached thereto,

and after full consideration of the same said writ of error was by the court allowed and a bond for costs, not to operate as a supersedeas bond, was thereupon fixed by the court in the sum of Five Hundred Dollars ($500); thereupon the court allowed a writ of error in said cause, which said writ of error was thereafter issued by Morton Albaugh, Clerk of the United States District Court within and for the District of Kansas.

Thereafter, on the 3rd day of December, 1915, said plaintiff in error, H. C. King, presented his bond to the court in the sum of Five Hundred Dollars ($500) with W. H. King as surety thereto and said surety having duly qualified that he is worth in excess of the sum of Three Thousand Dollars ($3,000) over and above his liabilities and exemptions, *and* the court being satisfied that the said bond was sufficient in all respects thereupon approved the same.

Thereafter on said 3rd day of December, 1915, a citation to the defendant in error, The Putnam Investment Company, was allowed and duly issued, properly attested, and thereafter the acknowledgment of the service of same with an entry of appearance was duly made and acknowledged by C. W. Burch and D. I. Litowich, the attorneys of record for said defendant in error, The Putnam Investment Company.

SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that there was lodged with me as such clerk on December 3rd, 1915, in the matter of The Putnam Investment Company, appellee, v. H. C. King, appellant:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the appellee, The Putnam Investment Company, and one to file in my office, and that on the 24th day of November, 1915, and on the days subsequent thereto mentioned in the foregoing true and correct copy of Journal Entry there was had in said cause the proceedings in said copy of Journal Entry set forth which were duly entered and remain of record in Journal — of said court, at page —.

In testimony whereof, I have hereunto set my hand and Affixed the seal of said court at my office in Topeka, Kansas, this 10th day of December, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the foregoing writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the

foregoing entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the official seal of said Supreme Court of the State of Kansas, in the city of Topeka, this 10th day of December, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 25,041. Kansas Supreme Court. Term No. 758. H. C. King, plaintiff in error, vs. The Putnam Investment Company. Filed December 14th, 1915. File No. 25,041.

(25041)

FILED
MAR 23 1918
JAMES D. MAHER
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 758. 10

H. C. KING, Plaintiff in Error.

vs.

IE PUTNAM INVESTMENT COMPANY, Defendant in Error.

Error to The Supreme Court of The State of Kansas.

Statement, Brief and Argument by Plaintiff in Error.

LEE MONROE,
JAMES A. MCCLURE,
C. M. MONROE,
Topeka, Kansas,
Attorneys for Plaintiff in Error.

KELLEY PUB. CO., TOPEKA

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(25041)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 758.

H. C. KING, Plaintiff in Error.

vs.

THE PUTNAM INVESTMENT COMPANY, Defendant in Error.

In Error to The Supreme Court of The State of Kansas.

Statement, Brief and Argument by Plaintiff in Error.

STATEMENT.

This action involves the legality of a contract purporting to obligate the plaintiff in error to sell and convey certain land in Logan County, Kansas, the title to 160 acres of which was vested in the United States Government, but which had been entered by his son under the homestead law,

and particularly involves the legality of a commission charged by a real estate agent for procuring a purchaser who was ready and willing to enter into such illegal contract. In October, 1904, the plaintiff in error, met J. E. Putnam, the Vice President of the defendant in error, in the caboose of a freight train. During their conversation King stated that he owned and desired to sell his ranch in Logan County, Kansas, containing 2,720 acres of deeded land, adjacent to which was a 160-acre tract of Government land upon which his son Arthur C. King had made an entry under the United States Homestead laws. King and Putnam disagree as to their conversation, the former claiming that he simply told the latter that he wished to sell the ranch while Putnam claims that King listed his 2,700 acres of land together with his son's interest in the homestead quarter section for sale, agreeing to accept $8,000 net therefor, the excess above that sum to go to the Investment Company as its commission for procuring purchaser. Putnam fully understood that 160 acres of the land was embraced by a homestead entry and made a memorandum of the legal description of the property in which opposite the quarter section of Government land he wrote the word "Homestead". There was but this one personal interview relative to the sale of the land but several letters and telegrams passed between the parties, a brief synopsis of which is necessary to the full understanding of the case.

In February, 1905, Putnam wrote King stating that in their former conversation King had said he had 2720 acres of land in Logan County for sale at $3 per acre and asking what commission would be paid if they located a buyer.

King wrote a reply on the back of this letter stating that he would accept $8,000 net for the land or would sell on long time at $3.25 per acre. (Tr. 10.) In October, 1905, the Investment Company wrote King asking whether his former figures were "still good" and what amount he was "willing to carry on the property." King replied that he still had the land, would like $1 per acre cash, but might consider other terms. (Tr. 10.) About November 25, 1905, Putnam entered into negotiations with F. D. Shellabarger of Salina, Kansas, as a prospective purchaser. These negotiations culminated in the making of a written agreement signed by Shellabarger for himself, and by The Investment Company as agent for King, which provides that Shellabarger buy the entire 2,880 acres of land including the quarter section covered by the homestead entry of the son for $10,080. The agreement provided that King would "convey and assure" to Shellabarger "in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, together with abstracts of title, showing perfect title, to be approved by purchaser's attorney", the entire 2,880 acres of land, including the 160 acres of Government land. (Tr. pp. 23-24.) King was notified of the pending negotiations by a telegram which referred to a sale of his "2,880 acre ranch". To this King replied by wire on November 27th, "can't definitely say. Write fully. Letter follows," and on the same day sent further reply by letter stating that he did not understand the telegram, that he had already sold another ranch containing 2810 acres, but still had a 2720 acre tract upon which he was considering the proposition of another party who "wanted until December 1st" and if such other proposition failed,

he would not "take further offers" until hearing from the Investment Company. On November 28th, upon receipt of King's wire, but prior to the arrival of his letter, Vice-President Putnam wrote him "regarding the sale of the Logan County ranch of 2880 acres," saying, "we have sold this property on the basis of . . . $8,000 net to you. We are ready to close the sale as soon as the abstract showing clear title is received and approved by the purchaser's attorney," etc., and asking King to come to Salina immediately to close the deal. (Tr. 12.) To this King, on November 29th, wired that the party referred to in his previous letter had three days option on the land, but the telegram was garbled in transmission. To this and Mr. King's letter of November 27th the Investment Company on November 29th replied stating that the telegram was not understood and specifically describing the lands which it had sold to Shellabarger which description included the 2720 acres deeded land belonging to King and his son's 160 acre homestead. King was also asked therein to "please forward abstracts of this land for examination." (Tr. 13.) Prior to the arrival of this last letter King was called away from home and did not return until December 6th. He then wrote the Investment Company acknowledging receipt of their letters and telegrams, stating again that he owned only 2720 acres, that on account of the indefiniteness in their description of it, once as 2810 and once as 2880, he had given another party an option to December 1st, that he would like to give that party a chance for his money, but that if he did not take it he would sell the 2720 acres to Shellabarger for $8,000. (Tr. 14.) To this the Investment Company replied by letter three days later, say-

ing they believed if King would look at their telegram he would find that the same stated 2880 instead of 2810 acres, suggesting that probably the difference in acreage arose "through including the W. ½ N. E. ¼ and E. ½ N. W. ¼ of Sec. 2, which we understand is included as a part of the ranch," and inquiring as to the condition of the title to such tract, and whether or not it had been proved up on, thus clearly showing that he had in view that the tract so described was the son's homestead claim. As a matter of fact this was a mistake in the description of the homestead claim which was the E. ½ of the N. E. ¼ and the E. ½ of the S. E. ¼ of Sec. 2. The Investment Company also protested against the granting of the option to King's other customer saying, "our sale was not made on condition that some other party should not take it, but it was a sale outright and unqualified," and "our client will expect this sale closed in accordance with the agreement." No further correspondence passed between the parties until December 27th, when Putnam wired King asking when he might meet him at Manhattan. To this King replied by letter that he could not do so and saying further that "as you also insist that it is 2880 acres as per your last letter, although I repeatedly said to you I only had 2720 acres, I do not see the use of going if I could." He also stated that he held the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of Sec. 2 by warranty deed, that he would have preferred to have sold his land on terms proposed by the Investment Company than to sell the option and still expressing his inability to understand just what land was included in the 2880 acres proposed to be sold to Shellabarger. (Tr. 15.)

The foregoing constitutes all the written communications had between the parties to this action and the one and only personal interview had was the casual conversation on the freight train.

On March 19, 1906, the Investment Company brought its suit based solely upon the parol contract alleged to have been made with King in October, 1904, to recover the excess of Shellabarger's office above $8,000 as its commission. It alleged that King had employed it to sell 2880 acres of land to 160 acres of which "he had not perfected title," but that he agreed if a sale was made he "would convey to any purchaser all of his right, title and interest to said quarter section." (Tr. 7.) The case was twice tried in the District Court of Pottawatomie County and twice appealed to the Supreme Court of Kansas, being found reported as Putnam vs. King, 82 Kan. 216, Id. 87 Kan. 842. Afterwards change of venue was had to the District Court of Jackson County, Kansas, where upon the trial a judgment was recovered against King for $2,973.36. From this judgment King appealed to the Kansas Supreme Court where the judgment was affirmed.

ASSIGNMENT OF ERRORS.

The Supreme Court of Kansas erred in holding that the contract between the Investment Company and King, whereby the Investment Company agreed to procure a purchaser for the body of land including the homestead quarter, and King agreed to pay a commission therefor, was valid and upon performance entitled the Investment Company to its commission, notwithstanding the inhibition of the U. S.

Homestead Laws against the alienation of government land prior to final entry. Other assignments of error presented to the Supreme Court were that the court erred in not holding that the Investment Company was not entitled to recover against King because it had never procured a purchaser who was ready, willing and able to buy the lands in question upon the terms which had been offered by King; that the failure to communicate to King the alleged fact that Shellabarger, the purchaser procured by the Investment Company, was willing to buy the ranch and not insist upon the conveyance of the homestead quarter, relieved King from liability on account of the commission and justified him in refusing to consumate the trade; that without incurring any liability for a commission to the Investment Company King could proceed to negotiate a sale of his own land to a purchaser found by himself at any time before he was advised that the purchaser found by the Investment Company had accepted his authorized offer. Other rulings on the admission of testimony and the instructions to the jury were complained of and set forth in the assignment of errors, but the main and decisive question before the State Supreme Court was the federal question whether the inhibition of the statute against sales of government land prior to final entry, which it will be admitted by all parties renders such sales invalid, will also apply so as to render invalid a contract with real estate brokers to procure, for a stated consideration, a purchaser to enter into such an illegal contract and whether the particular contract entered into in this case is brought within the general rule thus stated. The decision of this court upon these questions will be decisive of the entire

case for the reason that if the State Supreme Court erred in this regard its decision on the matters will be immaterial. We apprehend that if the State Supreme Court ruled correctly on these questions that this Court's rulings on the other points will not be considered by this Court, and we will therefore confine ourselves to the consideration of these matters only.

Said errors are more particularly set forth as follows:

1. The said State Supreme Court erred in affirming the judgment of the District Court of Jackson County, Kansas, involved in this cause and in not reversing said judgment.

2. The said State Supreme Court erred in overruling the application of the said appellant, H. C. King, for a rehearing herein.

3. The District Court of Jackson County, Kansas, erred in failing to adjudge and hold that the contract sued on and testified to by J. E. Putnam, President of The Putnam Investment Company aforesaid was against public policy and void for that it purported to obligate the aforesaid H. C. King to sell, convey and transfer a certain tract of land, the title to which was vested in the United States and for which original entry had been made under Section 2289 and 2290, Revised Statutes of the United States, commonly known as the Homestead Law, but for which no final entry had been made under Section 2291 of said Revised Statutes or final certificate or patent issued, and purported also to bind the appellant to pay the appellee for services in procuring a purchaser to enter into such void and illegal contract with him, the said H. C. King, and the said State Supreme Court erred in not reversing the said District Court in this regard.

It is alleged in the petition that King not only agreed to sell his own 2720 acres but also as a part of the same contract the land covered by his son's homestead entry as well. The allegation in the petition is:

"The defendant had not perfected the title to one quarter section of said land, to-wit, the East half of the East half of said Section 2, but that it was a part of defendant's ranch and properly belonged to said ranch, and under the terms of any sale which plaintiff should make of said real estate said quarter section should be included therein, and that defendant would convey to any purchaser all of his right, title and interest in and to said quarter section." (Tr. 7.)

The federal question now before this court was squarely raised by the following language of King's answer:

"Now comes the defendant, and admits that he was the owner of the land described in the petition, except the East Half of the Tast Half of Section 2, in Township 13, South of Range 36, West of the 6th P. M., which tract of land was government land." (Tr. 8.)

Putnam's testimony regarding the agreement was as follows:

"Q. You may state what further was said in this conversation concerning this matter. A. Well, he went into a general discussion, the description, etc. . . . He stated . . . there was a spring on one quarter in 2 of the homestead quarter. He stated that was a homestead that was not proved up, that it was held under a filing by his son, that this homestead would go—whatever interest he had, that he did not have title to it, but whoever purchased the property would get what title he had, or rather what title his son had and he would throw that in with the ranch so that the party purchasing could control this tract." (Tr. 18.)

The written contract entered into by the Investment Company acting for King and Shellabarger provided that:

"That the said party of the first part hereby covenants and agrees that if the party of the second part shall make the payment and perform the covenants hereinafter mentioned in this instrument, the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrance whatever, by a good and sufficient warranty deed, together with complete abstract of title, showing perfect title, to be approved by purchaser's attorney, the following lot, piece or parcel of ground, viz: . . . containing in the aggregate 2880 acres . . . for which second party agreed to pay $10,080." (Tr. 23.)

4. The said State Supreme Court also erred in deciding and holding that the appellee The Putnam Investment Company was entitled to a recovery either upon the contract sued upon or upon the facts proven upon the trial for that it was thereby made to appear that the appellee's claim for such recovery was based upon a contract and a transaction contrary to public policy and void in that it purported to obligate the appellant, H. C. King, to sell, convey and transfer a certain tract of land, the title to which was vested in the United States and a transaction contrary to public policy and void in that it was violative of the provisions, spirit and intent of Sections 2289, 2290 and 2291 of the Revised Statutes of the United States, all of which were well known to the appellee and its officers and agents at all times during the pendency of said transaction, for which errors the aforesaid H. C. King prays that the said judgment of the Supreme Court of the State of Kansas, dated July 10, 1915, be reversed and judgment rendered in favor of him, the said H. C. King, for costs.

POINTS AND AUTHORITIES.

I.

The alleged contract sued upon was void because of the inhibition of the United States Homestead Laws in that it contemplated the sale and conveyance of Government homestead land prior to final entry.

Anderson v. Carkins, 135 U. S. 483.
Sage v. Hampe, 235 U. S. 99.
Bailey v. Sanders, 228 U. S. 603.
Barnes v. Poirier, 12 C. C. A. 9, 64 Fed. 14.
Secs. 2289, 2290 and 2291, U. S. Revised Statutes.

II.

A contract with a real estate broker to pay a commission for effecting a sale of land, a part of which is a Government homestead, the sale of which is prohibited, and for procuring a purchaser who is ready and willing to enter into such illegal contract is equally invalid as such prohibited sale itself, and no liability arises for compensation for services under such contract.

Belding v. Pitkin's Exr., 2 Carnes Rep. (N. Y.) 147.
Irwin v. Williar, 110 U. S. 499.
Kahn, Jr., v. Walton et al., 46 Ohio St. 195, 20 N. E. 203.
Gibbs v. Consolidated Gas Co., 130 U. S. 396.
Bibb v. Allen, et al., 149 U. S. 481.
King v. Johnson, 30 Cal. App. 63, 157 Pac. 531.
Volker v. Fisk, et al., 75 N. J. Eq. 497, 72 Atl. 1011.
Street v. Houston Ice & Brewing Co., (Tex.) 55 S. W. 516.
Greenhood on Public Policy, p. 593.
Williams v. Gay, 21 La. Ann. 110.
Rhodes v. Summerhill, 4 Heisk (51 Tenn.) 204.
Irwin v. Levy, et al., 24 La. Ann. 302.

III.

The Supreme Court of Kansas erred in holding that the proposed sale of the property of defendant in error did not contemplate a conveyance of Government land such as is inhibited by the Federal Statutes, the facts of this case being such as bring it quarely within the rules laid down in the preceding propositions.

19 Cyc. 255.
Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058.
Libbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441.

ARGUMENT.

I.

The contract sued on, as alleged in the petition of the defendant in error and as sworn to by its witness Putnam, was void because of the inhibition of the United States Homestead Laws against alienation of Government lands prior to final entry. This presents the federal question on account of which the jurisdiction of this court is obtained and brings the case within the meaning of Section 709 of the revised statutes.

According to the evidence the plaintiff in error at the time of the conversation with Putnam on the train owned 2720 acres of land and his son owned 160 acres more by virtue of an original entry under the U. S. Homestead laws upon which he had not yet offered final proof and for which no final certificate or patent had issued. The contract sued on herein specifically provided for the sale of the homestead

quarter. Not only did the evidence show that it was the understanding of the parties that the homestead quarter should be transferred, but the petition stated that the homestead quarter "was a part of the defendant's ranch and properly belonged to said ranch and under the terms of any sale . . . should be included therein and that the defendant would convey to any purchaser his right, title and interest to said quarter section." The answer set forth that King was the owner of all the land with the exception of the homestead quarter "which tract of land was Government land". In his testimony Putnam admitted that King at the time of their one and only conversation stated that said quarter section "was a homestead that was not proved up", and that the purchaser would get whatever interest thereunder that he had in the same. The written contract introduced in evidence required King to "convey and assure to the party of the second part (Shellabarger) in fee simple, clear of all incumbrances whatever by a good and sufficient warranty deed," the entire 2880 acres of land which included the homestead quarter section. (Tr. 23.) In other words King, as a substantial part of the contract, agreed to convey in fee simple, clear of all incumbrances whatever a certain quarter section of Government land before final entry had been made thereon. This was the understanding of the parties at the time of their oral conversation, was their agreement as shown by the correspondence which passed between them and was so specifically provided in the written contract signed by Shellabarger and the Investment Co. Any agreement to make a conveyance of any interest in Government land prior to final entry is against public policy

and the direct inhibition of the statute and therefore void. Of such a contract it was said in Annderson vs. Carkins, 135 U. S. 483, as follows:

"There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity. Such being the scope and purpose of the federal statutes, it is not within the power of a state, directly or indirectly to nullify or set them at naught."

The late case of Sage v. Hampe, 235 U. S. 99 seems to us to be squarely in point. There the question was whether a contract by a third person to sell an interest in Indian land which the Federal Statutes forbade the Indians to sell was void, the court saying:

"A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for non-performance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co. v. Harper Brothers, 222 U. S. 55, 63. And more broadly it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. Providence Tool Co. v. Norris, 2 Wall. 45. Trist v. Child, 21 Wall. 441. Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261. Fuller v. Dame, 18 Pick, 472. It appears to us that this is a contract of that class. It called for an act that could not be done at the time and it tended to lead the defendant to induce the Indian owner to attempt what the law for his own good forbade." (Sage v. Hampe, 235 U. S. 99.)

We submit that if a contract by one other than an Indian

to sell land which an Indian is forbidden to sell is void that a contract by one other than the homesteader to sell land covered by a homestead entry which the entryman himself could not legally contract to sell is likewise void It will be noticed that one of the grounds stated for the reversal of the case of Sage v. Hampe, supra, was that any contract tending "in marked degree to bring about results that the law seeks to prevent" is void. The policy of the homestead law as regards alienation of the land covered by a home stead entry is stated in Bailey v. Sanders, 228 U. S. 603 to be that "it proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman." In commenting upon the effect of the Federal Statutes as an inhibition against any attempt to assign or convey an interest in a Government homestead after original entry and before final entry Judge Sanborn, speaking for the court in Barnes v. Poirier, 12 C. C. A. 9, 64 Fed. 14, said:

"Sections 2289-2291, 2304, 2305, under which original homestead might be entered, required each beneficiary to make affidavit, when he filed his application to enter the land, that his application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation, and not for the use or benefit of any other person. They also required that he should prove, before he entered the land, that he had actually resided upon and cultivated this homestead for at least one year after he made his application and that when he finally entered it he should make affidavit that he had not alienated any part of it. Inasmuch as he could not enter this original homestead after he had assigned or conveyed his right to any part of it, or agreed to assign or convey that right, without committing perjury, the courts uniformly have held that such an assignment or conveyance before entry was against public policy and void."

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Further citation of authorities on this proposition is unnecessary and there can be no dispute as to the broad general proposition that an attempted sale of Government land is invalid. In its opinion the Supreme Court of Kansas admitted this, saying:

"Of course any attempt to sell or mortgage Government land is contrary to statute as well as public policy and would be without effect. While this quarter section of land was spoken of as a part of the ranch it was understood that it was Government land and therefore not subject to sale." (Tr. 57.)

It only remains then to bring the present case within the application of the rule stated in order to secure the reversal of this case.

II.

A contract with a real estate broker to obtain a commission for effecting the illegal sale of Government land and for procuring a purchaser therefore is equally invalid as the contract of illegal sale itself.

If it be true that a contract to sell land covered by King's son's homestead entry prior to final proof would have been void, it follows clearly that any agreement between King and the Investment Company for the latter's services in procuring a purchaser for such land was likewise void. Belding v. Pitkin's Ex'r., 2 Caine's Rep. (N. Y.) 147, is squarely in point. There the testator during his life time contracted with Belding to sell for him certain lands in Pennsylvania, which the Pennsylvania Statutes declared were not legal subjects of sale. Belding having found a

purchaser "ready, willing and able to buy" sued for his agreed commission. The court held he could not recover and in so doing said:

"If the sale by Pitkin would have been illegal we are unable to discover how it could be legalized by his agent or broker. It is too salutary and well settled a principle to be in any measure infringed, that courts of justice ought not to assist an illegal transaction in any respect. To sustain the present action would be in some degree ratifying, countenancing and sanctioning an illegal contract. It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful. Whenever the consideration, which is the ground of the promise, or the promise, which is in the effect, or consequence of the consideration, is unlawful, the whole contract is void. In the present case, the object and consequence of the agreement was the sale of the pretended title. This being illegal, the promise to divide the spoil was, of course, illegal, and not to be enforced. All contracts that have a fraudulent object in view, are void, both at law and in equity."

In Irwin vs. Williar, 110 U. S. 499, the right of a broker to recover a commission for the sale of wheat for future delivery was the question before this court. The action was defended on the ground that the sale of the wheat was a wagering contract and void, and what therefore the contract for services in consummating the illegal sale was likewise void. The court said:

"In Rountree v. Smith, 108 U. S. 269, (S. C. 2 Sup. Ct. Rep. 630), it was said that brokers who had negotiated such contracts, suing, not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the

principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that *when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either, in forwarding the transaction.*"

The case of Kahn, Jr. vs. Walton et al., 46 Ohio St., 195, 20 N. E. 203, related to a similar transaction of sales for future delivery, and particularly the right to a commission for negotiating such prohibited sales. The syllabus of the case reads as follows:

"A commission broker, who, with knowledge of its unlawful character, negotiates an illegal agreement between parties, becomes a particeps criminis, and cannot recover for services rendered or losses incurred by him in behalf of either in forwarding the unlawful undertaking; and checks given him for such services or losses are tainted with the vice of their original and subject to all the infirmities of securities given for illegal considerations."

In the opinion the court quoted the rule enumerated in Irwin vs. Williar *supra,* saying in regard thereto that

"We accept this as a sound and wholesome rule, and under its operation the checks given by Walton to Kahn for services rendered and losses paid by him in the unlawful enterprise are tainted with the vice of their origin, and are subject to all the infirmities of securities given for illegal considerations."

The case of Gibbs Consolidated Gas Co. of Baltimore City, 130 U. S. 396, was a suit brought to recover for services in negotiating and consummating an arrangement and settlement of differences between two gas companies, which

settlement provided for the pooling of profits and the fixing of prices and which was held to be void as being against public policy. In holding that no recovery could be had for services performed in effecting the illegal contract of settlement, the court said that:

"Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the state, as well as restrained the particular corporation. The distinction between malum in se and malum prohibition has long since been exploided, and as 'there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal,' (Bank v. Owens, 2 Pet. 527, 539,) it is clear that contracts in direct violation of statautes expressly forbidding their execution cannot be enforced. The question is . . . a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared 'utterly null and void.' 'The rule of law,' said Parker, C. J., in Russell v. DeBrand, 15 Mass. 35, 39, 'is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.' We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed."

In the case of Bibb vs. Allen et al., 149 U. S. 481, which was a case brought by grain brokers to collect commissions for the sale of cotton for future delivery the court there recognized the rule for which we are here contending, saying that

"It is not questioned that, if the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein or for advances and disbursement by him for his principal, (Story, Ag. Secs. 330, 344, and authorities cited); the reason for this rule being that in such illegal transactions of which the agent has knowledge he is regarded as particeps crim-

inis, which precludes him from the recovery of either commissions or advances."

In King vs. Johnson, 30 Calif. App., 63, 157 Pac. 531, certain real estate brokers attempted to recover commissions for the sale of real estate. The defendants were the owners of a certain tract of land for which no map or plat had been filed of record, which the statute required to be done before the lots and parcels could be offered for sale. The plaintiffs knowing that said plats had not been filed and that therefore the sales of the lots would be invalid, procured purchases for a number of lots and brought this suit to collect their commissions on such prospective sales. The court said:

"It would seem clear that, in the absence of a compliance with the statute, it was a violation of law for defendants to even offer the lots for sale; and, if this be true, it was likewise a violation of law for plaintiff, as their agent, to offer them for sale, thus joining with his principals in a known illegal act for the doing of which he asks compensation. He is then seeking to recover for services, the performance of which was prohibited by law; hence the sole consideration for the contract upon which he bases his claim was the doing of known illegal acts. In Swanger v. Mayberry, 59 Cal. 01, it is said:

'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute, on the ground of public policy.'"

In Volker vs. Fisk et al., 75 N. J. Eq. 497, 72 Atl. 1011, a real estate broker sought to retain a commission paid her for the sale of real estate to an infant who afterwards

repudiated the purchase. The owner brought a suit to recover the commission paid for effecting such sale. The court said:

"The defendant Mrs. Fisk was the complainant's agent and cannot stand in any better position toward the purchaser, Fornarotto, than her principal, for whom she negotiated the sale. Her commissions could have been earned only upon negotiating a valid, not an invalid, sale. In Courter v. Lydecker, 71 N. J., Law, 511, 58 Atl. 1093, it was held that the condition upon which a broker earns a commission is that he shall obtain a sale. That, of course, means a valid sale. In this case it is as though no sale had been made and the transaction must be so treated. An invalid sale is practically no sale. This being so, Mrs. Fisk never earned a commission."

In Street et al., vs. The Houston Ice & Brewing Co., (Tex.), 55 S. W. 516, certain brokers attempted to recover from their principal a reasonable sum for their services as brokers in bringing about a contract between two companies to maintain prices and being generally in restraint of trade, which contract was illegal. In holding that a recovery could not be had for services in effecting such illegal contract, the court said:

"It does not seems to be disputed that the contract between the breweries was in contravention of the statute referred to; but it is claimed that plaintiffs nevertheless may recover of defendant because they rendered defendant the service, and in no manner became parties to, nor in any manner aided or participated in, the carrying out of any of the provisions of the contract. The statute, in terms, denounces the making or entering into such a contract, as well as the executing or carrying out of the same. Plaintiffs admit that they participated in, in fact procured, the combination between the companies. Hence there can be no question that their undertaking with defendant was to bring about the commission of an illegal act, and this cannot be

regarded as any consideration of a contract. The judgment is affirmed."

In its opinion the Supreme Court of Kansas states that the improvements as well as certain preferences of one having a filing upon Government land were subject to be transferred. While this is true, yet the fact remains that the contract entered into between the parties did not provide for the transfer of preferences or sale of improvements, but provided for an out and out sale of 2880 acres of land, which included the homestead quarter and the parties contemplated a transfer of the entire tract by warranty deed.

Mr. Greenhood at page 593 of his work on Public Policy lays down the following rule clearly applicable to this question:

"A contract to pay for service in enabling the promisor in doing something condemned by the policy of the law, or for services while engaged in violating the laws of the state or for services in intentionally aiding the promisor in violating the law is void."

We submit that if a sale of government land by or on behalf of a homesteader is forbidden or "condemned by the policy of" the Federal Statutes, as construed by the highest Federal Court, then the services for which the appellee was awarded a recovery were clearly rendered "in enabling the promisor in doing something condemned by the policy of the law" or "in intentionally aiding the promisor in violating the law." Upon this principle it was held that one could not recover for services rendered in transporting cotton for another within the Confederate lines through

the Federal lines during the Civil War because trade with the citizens of a country against which a state of war exists is illegal and contrary to public policy.

Williams v. Gay, 21 La. Ann. 110.
Rhodes v. Summerhill, 4 Heisk, 51 Tenn., 204.

In the latter case the court in holding a contract for such transportation void, said:

"The contract to transport cotton into the Federal lines for sale was not only illegal and void upon principles of international law but was contrary to the well known policy of the Confederate States as a de facto government, and to the laws of war as promulgated by the United States and various acts of Congress, enacted during the war, to prohibit commercial intercourse with the states engaged in insurrection."

Likewise in Irwin v. Levy, et al., 24 La. Ann. 202, it was held that an agent who purchased and shipped cotton for his principal from within territory occupied by the Confederate forces to within the Federal lines could not recover for his services, the court, after discussing the evidence, saying:

"With this view of the case it results that the traffic of the parties engaged in this litigation being in contravention of a prohibitory law, it must be pronounced that the contracts they entered into in the course of their illicit trade were null and void and that this suit cannot be entertained."

It will hardly be claimed that an agent could recover for services in making unlawful sales of intoxicating liquor for his principal in Kansas. Likewise, we say, so long as sales of land covered by homestead entries are held to be illegal and void under the federal statutes an agent cannot, under

the principles laid down in the foregoing authorities, collect a commission for securing a buyer who is ready and willing to make such an unlawful purchase.

The agreement to sell, according to the allegations of the petition and the testimony of Mr. Putnam, was an indivisible one, hence if it were illegal in part it must fail entirely.

III.

The Supreme Court of Kansas erred in holding that the proposed sale of King's property did not contemplate a conveyance of government land such as is inhibited by the Federal Statutes. When King gave Putnam the description of his ranch, during the conversation on the freight train, the description included 2,720 acres of deeded land and also the 160 acres included in the homestead. At that time Putnam admits that he noted on his memorandum the word "homestead" opposite the description of that quarter section (Trans. p. 17, 30). Putnam later had negotiations with the prospective purchaser, Shellabarger, which culminated in the execution of a written contract, which Putnam, without authority, signed as agent for King, and which purported to bind King to convey in fee simple the 2880 acres of land therein described, and this description included the homestead quarter. It is true, as the Kansas Court stated, that King never saw this written contract and did not know of its execution until the time of the first trial in the District Court. Defendant in error also claimed that Shellabarger was willing to accept a conveyance of the 2720 acres owned by King and a conveyance, or assign-

ment of whatever interest King might have in the homestead quarter. However, the negotiations between King and the Investment Company consisted of correspondence which was introduced in evidence in its entirety. Throughout the correspondence demand was constantly and without exception made upon King that he convey 2880 acres. No suggestion was made that any other arrangement would be satisfactory and it is elementary that the rights of plaintiff in error cannot be affected by any oral agreement or understanding between Putnam and the prospective purchaser, no intimation of which was ever at any time communicated to him.

Concerning this homestead land plaintiff in error alleged in its petition:

"Under the terms of any sale which plaintiff should make of said real estate said quarter section should be included therein, *and that defendant would convey to any purchaser all of his right, title and interest in and to said quarter section.*" (Trans. p. 7.)

The Investment Company should not be now heard to say that a conveyance was not contemplated. What was communicated to King relative to the inclusion of the homestead land in the proposed deal is shown clearly by the correspondence. On November 28th the Investment Company wrote:

"We received your wire yesterday in answer to ours of the 25th regarding sale of the Logan County ranch of 2880 acres. . . . We have sold this property on the basis of the price given our Mr. J. E. Putnam some time ago, namely $8,000 net to you. We are ready to close sale as soon as the abstract showing clear title is received and approved by purchaser's attorney." (Trans. p. 12.)

In their letter of Dec. 9th appears the following:

" . . . Regarding the discrepancy in the number of acres referred to in your letter, we believe that if you will look at our telegram you will find same stated 2880 acres and not 2810. . . . It seems that the difference in the acreage arises through including the W. ½ of the N. E. ¼ and the E. ½ of N. W. ¼ of Section 2, which we understand is included as a part of the ranch. Now, as to the sale of this property, as previously advised you, *we have sold this absolutely*. . . . What is the condition of the title to the W. ½ N. E. ¼ and E. ½ N. W. ¼ Section 2, and what title or interest have you in same, and what sort of conveyance of that interest could be made? If it has not been proved up on, could not relinquishment, or assignment of the present interest be arranged, so as to eventually give Mr. Shellabarger good title?" (Trans. pp. 25, 26.)

In reply to this letter Kig notified defendant in error that he had warranty deed for the land described and the discrepancy was not in including that land, and also stated that he had made another deal in the meantime. At no place throughout the correspondence is it suggested to King that the prospective purchaser expected to pay him the sum of $8,000 net to him for any amount of land less than 2880 acres. King refused to complete the deal because he owned only 2720 acres and could not comply with the demands made by Putnam in his letters and telegrams. It was checked squarely up to King that he was expected to make conveyance of the entire amount. The written contract which Shellabarger signed shows that he anticipated buying that amount of land. The petition of the Investment Company alleges that some sort of a conveyance of 2880 acres was contemplated. When all these facts are taken into consideration it is apparent that the parties throughout their dealings contemplated a conveyance of the entire acreage,

including the homestead, and that the contention that the prospective purchaser was in fact willing to accept a less amount of land than originally agreed or only 2720 acres was an afterthought. At any rate King was never notified of any such alleged willigness to accept a less amount, which would have relieved him of the requirement to convey the homestead which was insisted upon all through the correspondence and contemplated by the original written agreement between the Investment Company and Shellabarger.

The Supreme Court of Kansas in the opinion herein, although recognizing apparently the force of plaintiff in error's contention, evaded the effect thereof as is shown by the followig portion of the opinion:

"The action brought rests upon the agreement that plaintiff was to find a purchaser for the four and a quarter sections of land and such interest as the defendant might have in the other quarter, together with the compliance by the plaintiff with the terms of that agreement. The plaintiff and the purchaser soon discovered that the writing as drawn was invalid and it was never brought to the attention of defendant nor did he learn of the existence of the writing until after the litigation had been begun. Besides, the agreement actually made with Shellabarger, the purchaser, did not undertake to sell government land nor to make a transfer of it in contravention of the Federal laws. It may also be said that defendant did not decline to carry out his agreement nor to transfer the land to the purchaser on account of the terms of this writing and he could not well have based his refusal on the ground as he admitted that he did not see the contract until the first trial of this case."

This portion of the opinion is based upon the evidence of the witness Putnam who claimed that although Shellabarger entered into the written contract, he had orally

agreed that he would be satisfied with a conveyance of 2720 acres, taking whatever interest King might have in the homestead quarter. In other words if King had no interest he would take none. However, the state court entirely overlooked the fact that it was necessary to inform Mr. King of such attitude. If such an expression was ever made by Shellabarger, King never heard of it. The court evidently failed to notice that the correspondence between the parties to the action contained reiterated demands for a conveyance of 2880 acres and no statement that anything else would be acceptable. In the meantime King repeatedly called the attention of defendant in error to the fact that he did not own the amount of land they were calling for and could not make such a conveyance. This was the reason that no deal was ever consummated.

"Q. I want to ask you this question—why was it, Mr. King, that you did not complete this sale through Mr. Putnam when he told you he had found a buyer? A. Because they wanted title to 160 acres more land than I had." (Tr. 34.)

We submit that it would be a novel state of the law which would allow a real estate agent to collect a commission from a defendant for failing to consummate a deal which had never been submitted to the principal. The only proposition submitted contemplated the inclusion of the homestead as a part of the land which King was asked to convey. If any cause of action at all arose it was because of his failure to consummate that sale, and the rights of the parties should be measured by it and not by some secret arragement between the prospective purchaser and the real

estate broker which King was never given opportunity either to accept or to reject. Under the authorities cited defendant in error could not collect a commission for the deal submitted to King and certainly should not be heard to claim that there was another deal of which King had no notice, thus being allowed to collect a commission for consummating a deal which King never passed upon.

In substance the contention of the parties is this: The Investment Company claims: "We were employed to effect a sale. We found the purchaser but King refused to convey. Notwithstanding such refusal he is liable for our services." On the other hand King claims: "I refused to convey because the purchaser demanded a conveyance to more land than I had title to and could legally convey. If he was willing to accept a conveyance to only 2720 acres or had agreed to do so, I was never so informed. The only proposition submitted to me called for the inclusion of the homestead." The correspondence shows on its face that no explanation of Shellabarger's alleged attitude was made to King.

These facts, summed up, leave this cause in the following condition: If King is liable at all it must be because a purchaser ready, willing and able to buy upon his terms was procured and presented to him by the Investment Company.

"To entitled him to a commission where no sale is actually consummated, a broker employed, to find a purchaser must either produce to the owner a customer who is able, ready and willing to buy on the terms prescribed by the owner or else take from the customer a binding contract of purchase." (19 Cyc. 255.)

"The general rule in such circumstances is that he cannot recover commissions unless he shows that he *procured and produced to his principal* a person ready, willing, and able to purchase the property upon the terms and conditions under which he was authorized to negotiate a sale." (Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058.)

"The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made. And until that is done his right to commissions does not accrue." (Libbald v. Bethlehem Iron Co., 83 N. Y., 378, 38 Am. Rep. 441.)

If the real contract between them was to the effect that the Investment Company was to procure a purchaser for only the 2720 acres of land irrespective of the homestead, then they did not submit an offer which met King's terms, as they notified him only of a prospective purchaser who was willing to pay $8,000 net to King for a conveyance of 2880 acres. On the other hand, if the offer submitted to King did in fact comply with the terms under which he had authorized defendant in error to find a purchaser, and which it must have done before defendant in error could be said to have earned a commission, then, we submit, the contract between King and the Investment Company, must be held by the Court to have contemplated a sale of the entire 2880 acres, or the inclusion of the homestead tract in the land of which King was to execute a conveyance in case defendant produced a buyer. In other words, if the offer submitted by Putnam, did not conform to the prior understanding, there can be no liability as no commission was earned, but if the offer did conform, then the prior agreement was unlawful under the authorities cited and there can be no liability for a commission for carrying out the

illegal contract. Taking either horn of the dilemma brings us to the same result.

IN CONCLUSION.

We submit that under the authorities cited a contract to procure a purchaser for government land must be held to be void. The only offer submitted by Putnam called for just such a conveyance, and it must be held that the offer conformed to the oral contract between the parties before it can be held that a commission had been earned by the broker. If King was compelled under the terms of the original employment to pay a commission upon receipt of an offer to buy the entire 2880 acres of land, then the original employment must be held to have contemplated a sale of government land, and such contract is clearly void. We submit that the Supreme Court of Kansas erred in affirming the judgment of the lower court, and that the court should remand this cause with directions to render judgment for the plaintiff in error for his costs.

Respectfully submitted,

LEE MONROE,
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(25041)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 10

H. C. KING, Plaintiff in Error.

v.

THE PUTNAM INVESTMENT COMPANY, Defendant in Error.

In Error to The Supreme Court of The State of Kansas.

Statement, Brief and Argument by Defendant in Error.

B. I. LITOWICH, Salina, Kansas,
Attorney for Defendant in Error.

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Statement, Brief and Argument by Defendant in Error.

Statement.

This is an action brought for the recovery of a real estate agent's commission for the sale of a ranch. It is based upon an oral contract of employment made in October, 1904. (Tr. 7, 16, 17, 18). In the conversation the defendant stated in substance that his son had a filing

upon a quarter section of Government land: that he did not have title to it: but that in case of a sale of the ranch whatever interest his son had in this quarter at the time would go with the ranch; that it was not of much value but connected up several sections. (Tr. 18, 29, 30).

November 25, 1905, the defendant in error, after ascertaining from the plaintiff in error that the land was still for sale upon the terms of the former conversation, found a purchaser for the land and advised the plaintiff in error.

From the beginning of the negotiations, the purchaser, Mr. Shellabarger, was advised that Mr. King might not own one quarter of the land: that his title might not have been perfected: that Mr. Shellabarger might not get it or any interest in it: but that whatever interest either Mr. King or his son then had in it Mr. Shellabarger should receive. (Tr. 21, 22).

After Mr. Shellabarger agreed to buy, Mr. Putnam went to his office, and, not being able to recall which was the uncertain quarter, drew the written agreement, "Exhibit P" (Tr. 23, 24) for the sale of all of the land to Mr. Shellabarger. This was signed by Mr. Shellabarger and by the defendant in error.

Thereafter, for several inconsistent reasons, the plaintiff in error refused to sell the land. Defendant in error, and Mr. Shellabarger, consulted counsel. They were advised that the written agreement they had signed was void under the Kansas Statute of Frauds for the reason that plaintiff had no authority in writing from the defendant to sign any contract for the sale of real estate.

The whole matter of the title to the land was discussed again and Mr. Shellabarger said that he would pay $10,080.00 for the ranch; if Mr. King's son had perfected his title to the quarter he wanted it, but if Mr. King had no interest in it he would take the ranch without the quarter and pay that price. (Tr. 27, 28, 32).

Mr. King declined to meet the defendant in error or Mr. Shellabarger and finally declared all negotiations off and refused to sell.

Argument.

All questions as to the employment of the agent, the amount of commission and the finding of a purchaser ready, willing and able to purchase were settled by the State Courts.

No federal question is involved. The only excuse for an appeal to this court is the fact that Mr. Putnam signed a void writing, "Exhibit P". This was void under Section 1, Ch. 266, Laws 1905, the same being Sec. 4889 Gen. Stats. Kan. 1915. (Tr. 23).

Mr. King never saw this contract until the time of trial. (Tr. 16). He did not know its contents. (Tr. 29). He is not sued upon this contract. He never gave this contract as an excuse for not selling. He did not defend on account of this contract in writing.

Contrary to the statement of the plaintiff in error that he raised the claimed federal question in his answer, the defendant in error, pleaded only that The Putnam Investment Company was not his agent for the sale of his land. The second amended answer admits ownership of

all of the land except one quarter but denies agency. (Tr. 44). No request for instructions upon such a defense appears in the record. This claimed defense does not appear in the record until present counsel appear in the last appeal of the case to the Supreme Court of Kansas.

Mr. King never authorized the defendant in error to sell Government land. Mr. Putnam never offered to sell Mr. Shellabarger, Government land. Mr. Shellabarger never either offered or intended to buy Government land.

An unlawful intent cannot be presumed. Mr. King expressly stated that only whatever interest he had at the time in this quarter should be sold. This meant any interest which he could lawfully sell. If by the time a purchaser was secured, his son's title was perfected, then, it was for sale with the rest of the land. He would not want a little strip of poor land a quarter of a mile wide and one mile long in the middle of another man's land. A purchaser would not want Mr. King to retain such a strip in the middle of his ranch. It was a reasonable, practical, lawful understanding between men who intended to do right.

As a matter of fact at the time the defendant in error found the purchaser, neither Mr. King nor his son had any interest in the land. The son's filing had been cancelled, October 27, 1904. ("Ex. V." Tr. 28). This was within two weeks after Mr. King had verbally authorized the defendant in error to sell his ranch, and was one year and twenty-nine days before the land was first men-

tioned to the purchaser, Mr. Shellabarger. (Tr. 20, 22, 23).

Much of the brief of the plaintiff in error is devoted to questions fully and properly determined by the state courts and a discussion of them is unnecessary.

The defendant in error waives a discussion of the decisions cited in the brief of plaintiff in error. The law is plain but the facts of this case do not bring it within the rule of those decisions. The record fully discloses that neither the principal, the agent nor the purchaser ever contemplated or negotiated for the sale of Government land.

Mr. King did not at any time understand that he was to convey Government land or more land than he had. In his letter of December 9, 1905, Mr. Putnam clearly indicated that full title to 2880 acres of land was not expected. (Tr. 25, 26). From memory, he misdescribed the quarter, but Mr. King understood that he was not to convey 2880 acres of land.

The Supreme Court of Kansas had a full and clear understanding of the case. Nothing can be added to the plain statements of Mr. Justice Johnston in the opinion except, that Mr. King never had a filing on this quarter section and one year and twenty-nine days before any negotiations were had for the sale of the land, all interest of his son in this quarter section had been voluntarily relinquished to the Government and the original filing had been cancelled.

The rights of the homesteader sought to be preserved by the rule prohibiting the sale of government land, were never involved in this case. Mr. King was not

a homesteader. It does not appear that he had any authority to represent his son. His son was not a party to any negotiations for the sale of the ranch.

The decision of the Supreme Court of the State of Kansas affirming the judgment of the trial court was correct.

Respectfully submitted:

B. I. LITOWICH,
Attorney for Defendant in Error.

KING *v.* PUTNAM INVESTMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 10. Submitted November 7, 1918.—Decided November 18, 1918.

The contention that a contract of agency to sell real estate was void because federal lands, under homestead entry, were included, presents no federal question where the state court found they were not included and the record supports the finding.

Writ of error to review 96 Kansas, 109, dismissed.

THE case is stated in the opinion.

Mr. Lee Monroe for plaintiff in error. *Mr. James A. McClure* and *Mr. C. M. Monroe* were also on the brief.

Mr. B. I. Litowich for defendant in error.

Memorandum for the court by THE CHIEF JUSTICE.

Having previously considered this case (82 Kansas, 216; 87 Kansas, 842) the court awarded relief because of the violation of a contract of employment to procure the sale of real estate. 96 Kansas, 109.

The case is here in reliance upon a federal question based upon the assumption that the authority to sell included land belonging to the United States covered by an inchoate homestead entry. But the court below expressly

found that such land was not included in the contract, hence the sole basis for the asserted federal question disappears.

And this result is not changed by considering, to the extent that it is our duty to do so, the question of fact upon which the existence of the alleged federal question depends. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591. We so conclude because the result of discharging that duty leaves us convinced that the finding below was adequately sustained; indeed, that the record makes it clear that the alleged ground for the federal question was a mere afterthought. The case, therefore, must be and is

Dismissed for want of jurisdiction.